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PETITION FOR A WRIT OF CERTIORARI

The Lummi Nation, Upper Skagit Indian Tribe, Tulalip Tribes, Swinomish Indian Tribal Community, Port Gamble S'Klallam and Jamestown S'Klallam Tribes and the Yakama Nation, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing is unreported. The decision of the Court of Appeals on the merits is reported at *United States, et al. v. Washington*, 394 F.3d 1152 (9th Cir. 2005). The opinion of the District Court denying relief from the judgment denying Respondent Tribe's Treaty rights, pursuant to Federal Rule of Civil Procedure 60(b)(6), is unreported.

STATEMENT OF JURISDICTION

On June 14, 2005, the Court of Appeals for the Ninth Circuit denied the request for rehearing *en banc* and the petition for rehearing by the panel and issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.: On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case is the latest appeal in the complex 35 year-old Indian Treaty fishing litigation of *United States v. Washington*, 384 F.Supp. 312 (W.D. WA 1974), *aff'd*, 520 F.2d 676 (9th Cir 1975), *cert. den.*, 423 U.S. 1087 (1976), *substantially aff'd sub nom, Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). As in many continuing jurisdiction natural resource allocation cases, the federal courts have issued dozens of rulings upon which the parties and the public have relied and continue to rely for the management of the fishery resources of the Pacific Northwest: here, at least thirty-six (36) reported Ninth Circuit opinions, eleven (11) reported District Court decisions and countless unreported District Court rulings.[1] The Ninth Circuit has now thrown much of this settled law into question.

In 1974, the District Court initially confirmed that five 1850s-era Treaties secured to some fourteen Washington State Indian Tribes the opportunity to harvest half of the salmon returning to tribal usual and accustomed fishing places. Petitioners Lummi Nation, Upper Skagit Indian Tribe, and Yakama Nation were among these tribes. *Id.* When the District Court issued this decision, Petitioner Upper Skagit Indian Tribe and the Stillaguamish Tribe were not recognized by the United States as American Indian Tribes. Nonetheless, the Ninth Circuit ruled that these 'unrecognized' tribes still held valid treaty fishing rights. *United States v. Washington*, 520 F.2d at 692-3.

Many other tribes successfully moved to intervene and obtain recognition of their treaty rights, including Petitioners Swinomish Indian Tribal Community Port Gamble, Jamestown and Tulalip Tribes. Five additional

1. *See* Appendix E.

groups, including Respondent Samish Indian Nation[2] ('Samish'), sought treaty fishing rights, but were found not to have them. *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981), *cert. den.*, 454 U.S. 1143 (1982). Samish chose to seek to intervene in 1974. Samish submitted the best evidence it could find to the Special Master assigned to the case, but he ruled against them. The District Court heard the matter on an appeal from the Master's decision and received substantial additional evidence. It, too, ruled against the Samish. *Id.* The Ninth Circuit made an unusually close examination of the full record before the District Court. It ruled that the factual findings (1) that Samish was not a successor in interest to any Treaty signer and (2) that Samish had not maintained an organized tribal structure in a political sense, were not clearly erroneous and were therefore affirmed. *United States v. Washington,* 641 F.2d at 1374. The Ninth Circuit reiterated its prior holding that federal recognition was not necessary, or even sufficient, to confirm treaty rights: ". . . we indicated that treaty – tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure. 520 F.2d at 693, 641 F.2d at 1371." After this ruling, Samish sought federal recognition as a tribe through the Bureau of Indian Affairs tribal acknowledgement[3] process, to gain the federal benefits that follow acknowledgement[4] and as a way around the 1979 holding that it was not a treaty tribe. By using this administrative procedure, Samish was able to exclude Petitioners from participating and challenging Samish assertions of Treaty rights. After an adverse decision

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2. Then known as the Samish Indian Tribe.

3. Federal acknowledgement and federal recognition are the same.

4. Federal recognition brings its own rewards, including health and education benefits as well as participation in gaming operations.

from the Bureau of Indian Affairs, Samish appealed, alleging (1) that the Bureau of Indian Affairs had mishandled Samish' petition for recognition, and (2) that Samish was entitled to treaty fishing rights. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989).

Petitioner Tulalip Tribe sought to intervene in *Greene*. Samish vigorously opposed Tulalip intervention, and the District Court denied Tulalip's motion to intervene. Stating that "the calculus for tribal treaty rights under the Ninth Circuit law is separate and distinct from that for federal acknowledgment," the District Court rejected Tulalip's concern that Samish would attempt to use *Greene* as the first step to overturning the District Court's Samish treaty status rulings. Tulalip then filed an interlocutory appeal on the intervention issue, which the Ninth Circuit denied on the ground that the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993). (Petitioner Swinomish Indian Tribal Community also unsuccessfully attempted to intervene in the administrative process.) 61 Fed. Reg. 15,826 (1996).

On remand to the District Court, Samish sought to relitigate the issue as to whether or not it was the successor in interest to the aboriginal Samish Tribe that signed the Treaty of Point Elliot and thus entitled to treaty fishing rights. After reviewing the 1979 treaty status decision in depth, the District Court in 1991 and 1992 held that Samish was barred under the doctrine of *res judicata* from relitigating that status, and that "plaintiffs, therefore, have no rights under the Treaty of Point Elliot."[5] The Court also found that the "[Samish]

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5. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order Granting Federal Defendants' Motion for Partial Summary Judgment at 10-13.

had a full and fair opportunity to litigate the issue of tribal succession," and that "[Samish] cannot escape the results entered therein by recasting its claims here."[6] The District Court subsequently reaffirmed its ruling[7]: the issue of treaty status had been resolved in *United States v. Washington*, it was binding in this case, and "treaty issues cannot be relitigated."[8] That conclusion was subsequently upheld by the Ninth Circuit in *Greene v. United States*, 996 F.2d 973, 975 (9th Cir. 1993). After additional administrative proceedings and yet another appeal to the District Court, the Samish were recognized in 1996. Five years later Samish sought relief from the 1979 treaty status judgment under Federal Rule of Civil Procedure 60(b). Samish asserted that the act of federal acknowledgment, coupled with the misconduct of the United States in its recognition battle, was grounds for relief pursuant to Fed. R. Civ. 60(b)(6). (Misconduct was not alleged as to any of the Petitioners.)

At no time from 1979 until the present has Samish alleged it was hindered in any way from presenting its case in the treaty status proceedings. Nor has Samish claimed that those proceedings were in any way unfair.

The District Court denied Samish's motion to re-open the judgment, holding that recognition did not constitute "extraordinary circumstances" justifying relief under Rule 60(b)(6) and that finality concerns outweighed Samish's interest in reopening the judgment given the complexity of the treaty fishing rights case. The Ninth Circuit reversed, finding that the need for finality was outweighed by the

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6. *Id.* at 15-16.

7. *Greene v. Lujan*, Cause No. C89-645Z (W.D. Wash. 1989), Order dated February 25, 1992 at 5,7.

8. *Id.* at 7.

"extraordinary circumstance" of federal recognition coupled with the misconduct of the United States in its handling of Samish's quest for recognition.

By granting relief based on misconduct that occurred many years ago in a separate proceeding, the Ninth Circuit creates a conflict with rulings of sister circuits and potentially unsettles the thirty-one years of decisions in *United States v. Washington*[9] which have shaped fisheries management in Washington, Oregon and Alaska and under the Pacific Salmon Treaty with Canada. The Ninth Circuit also effectively denied Petitioners due process of law by holding that an administrative decision in a proceeding in which Petitioners were denied a voice may be a basis for reopening the 1979 decision on Samish's treaty tribe status. The Ninth Circuit decision has the immediate effect of destroying the parties' expectation of finality in the many prior rulings in this case. For example, Counsel for the Samish has ***already*** argued to the District Court that certain final rulings on "political successorship," made in 1974 and 1994, are no longer binding due to the Ninth Circuit decision on review here:

> The Ninth Circuit expressly ruled that the Lummi Nation and Swinomish Indian Community are not the political successors to the Samish Tribe. The Ninth Circuit then overruled any inconsistent rulings made on this subject by Judge Boldt in *Washington I*. . . . The Samish Indian Nation cannot be bound by any previous determinations of the Court in *U.S. v. Washington* regarding successorship to the Samish Tribe. . . .
>
> A similar issue exists regarding successorship to the Noowhaha Tribe. . . . In *United States v.*

9. The original District Court decision issued in 1974.

> *Washington*, 873 F. Supp. 1422, 1449 (W.D. Wash. 1994), the Court concluded that the Upper Skagit Tribe is the successor to the Noowhaha Tribe. . . . For present purposes, Samish entry into *U.S. v. Washington* cannot be condition on acceptance by the Samish Tribe of the 1994 Upper Skagit decision. This issue must be maintained as an active issue for future resolution.

Brief of Samish Indian Nation in Support of Samish Nation's Rule 60(b)(6) Motion on remand in W.D. Wash. Cause #Civ. 70-9213 (Subproceeding 01-2), filed 8/12/2005, at pages23-26. Samish has also asked the District Court to allow it to relitigate ***any*** issue if another Tribe takes a position on the issue adverse to Samish:

> While the Samish Tribe does not intend to raise or reopen previously decided issues as a general matter, the general rule should not as a matter of equity and justice apply when another party contests the Samish Tribe.

Id. at 23. The District Court, intimately familiar with the complexities of the *United States v. Washington* litigation, predicted the disruption that relitigation of previously decided issues would cause:

> The parties have worked diligently and extensively over the many years this case has been active to establish management frameworks that accommodate the fiercely competing needs of the various tribes and of the State. The issues have been complicated by the increasing scarcity of fish stocks and the need to preserve and conserve certain fish species. This case over a 28-year period has proven to be a battleground where

> many of these issues have been fought and solutions hammered out. The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this state, their addition would wreak havoc on hard-wrought management agreements and plans.

United States v. Washington, W.D. Wash. Cause # Civ. 70-9213, Order Denying the Samish Tribe's Motion to ReOpen Judgment, December 10, 2002, at page 17.

In addition to posing potential disruption to the complex litigation involved here, the Ninth Circuit decision vastly expands the grounds for re-opening a judgment under Rule 60(b)(6), and denies the Petitioner Tribes due process of law.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Ruling Denies Petitioners Due Process of Law.

After losing its bid for treaty tribe status in the courts, Samish continued to press for administrative recognition as a tribe through the federal acknowledgment process, 25 C.F.R. pt. 83. Petitioners Tulalip and Swinomish each tried to intervene in the administrative proceeding to protect their treaty fishing rights, but were refused. After the Bureau of Indian Affairs rejected Samish's recognition claim, Samish brought suit in district court alleging that the BIA had mishandled its petition for recognition and that it was entitled to treaty fishing rights. *Greene v. Lujan*, No. C89-645Z (W.D. Wash. 1989). The Tulalip Tribes again sought to intervene based on the contention that recognition could lead to dilution of Tulalip and other tribal treaty fishing allocations. The District Court rejected this contention. Minute Order (Oct. 16, 1989), *Greene*, No. C89-645Z.

Tulalip renewed its motion to intervene, arguing that Tulalip treaty fishing rights were threatened by the Samish attempt to obtain federal recognition. The District Court ultimately held that the issue of treaty status had been resolved in *United States v. Washington*, and that "treaty issues cannot be relitigated." Order of Feb. 25, 1992, at 7, 11, 16-26, *Greene*, No. C89-645Z.

Tulalip filed an interlocutory appeal of the denial of its intervention request. The Ninth Circuit affirmed because the issues of tribal recognition and treaty tribe status were fundamentally different. *Greene*, 996 F.2d at 976-78. The Circuit acknowledged that Tulalip would have a right to intervene *if* recognition would have an impact on Samish's treaty tribe status, *but expressly held that there would be no such impact*:

> We recognize that the two inquiries [*e.g.*, recognition and treaty status] are similar. Yet each determination serves a different purpose and has an independent legal effect. . . . *Federal recognition does not self-execute treaty rights claims. . . . As we just said, the Samish may not gain fishing rights from federal recognition alone.*

Id. at 977 (emphasis added).

In the case at bar, however, the Ninth Circuit did an "about-face," and held that federal recognition allows reconsideration of a treaty status decision. As the dissenting opinion below eloquently pointed out, that change of heart denied Tulalip and Swinomish[10] due process of law:

> It would have been an empty promise – indeed, a complete denial of due process – to deny the

10. Other Tribes may have foregone the opportunity to attempt intervention, in reliance upon the Court's rejection of the Tulalip and Swinomish motions to intervene.

> Tulalip Tribe's motion to intervene in the Samish BIA recognition proceedings on the basis that it could later protect its treaty rights in the *Washington I* and *II* courts, while all along assuming that by virtue of the Samish tribe gaining federal recognition, the *Washington I* and *II* courts would be required to grant the Samish tribe treaty rights. If that was the case, where then was the Tulalip Tribe to protect its interests? Elementary principles of due process . . . require that a tribe challenging the Samish Tribe's claims to treaty rights have an opportunity to disprove the maintenance of organized tribal structure and not be precluded from offering such proof by an administrative agency determination from which the challenging tribe was excluded.

United States, et al. v. Washington, 394 F.3d 1152 at 1168 (Bea, J. dissenting).

The dissent is correct. The Due Process Clause of Fifth Amendment to the United State's Constitution "requires that a party affected by government action be given 'the opportunity to be heard at a meaningful time in a meaningful manner.'" *California v. FERC,* 329 F.3d 700, 708 n.6 (9th Cir. 2003), *quoting Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Petitioners were denied that opportunity when their motions to intervene in the recognition proceedings were denied. If the Ninth Circuit decision is allowed to stand, then the Tulalip Tribe, the Swinomish Indian Tribal Community, and all the other Tribes which relied on the rulings in the *Greene* cases must now be permitted to seek relief from the judgment in the recognition proceeding and from the judgment in *Greene,* on the grounds that these judgments are void because they were issued in violation of Petitioners' constitutional right to due process of law. Re-opening the

Samish recognition proceeding would in turn upset the basis for the Ninth Circuit's ruling below, requiring reversal here. Either way, the Ninth Circuit's decision cannot stand.

B. The Ninth Circuit's decision in this case creates a substantial conflict among the Circuits on two issues.

1. Whether a change in the law constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6).

Every other federal court of appeals that has addressed the issue, other than the Ninth Circuit in the case below, has held that a change in the law does not constitute "extraordinary circumstances" warranting re-opening under Fed. R. Civ. P. 60(b)(6):

> It appears to be the settled rule of law that a change in the judicial view of the applicable law, after a final judgment, is not the basis for vacating a judgment entered before the announcement of the change

Berryhill v. United States 199 F.2d 217 (6th Cir 1952) (citations omitted), *Accord: Ashland Oil, Inc. v. Delta Oil Products Corp.*, 806 F.2d 1031 (Fed. Cir. 1992); *Morris v. Horn*, 187 F.3d 333 (3rd Cir. 1999); *Kirby v. General Elec. Co.*, 210 F.R.D. 180 (W.D.N.C. 2000), *aff'd*, 20 Fed. Appx. 167 (4th Cir. 2001); *Hess v. Cockrell*, 281 F.3d 212 (5th Cir. 2002); *Lehman Co. v. Appleton Toy & Furniture Co.*, 148 F.2d 988 (7th Cir. 1945).

The Ninth Circuit, on the other hand, stands alone and opines for the first time in any circuit that a change in a rule of law (i.e. the rule that federal recognition is neither relevant to nor determinative of treaty tribe status) is an "extraordinary

circumstance" justifying reopening pursuant to Fed. R. Civ. P. 60(b)(6). This Court should grant certiorari and bring the law of the Ninth Circuit back into line with the law of its sister Circuits.

2. Whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6).

The Ninth Circuit opinion also creates a split in the Circuits on the issue of whether post-judgment misconduct occurring many years ago in a separate proceeding is a basis for relief under Rule 60(b)(6). The Ninth Circuit granted reopening in this case under Rule 60(b)(6) in part on the basis of alleged misconduct by the United States many years ago, even though (1) "misconduct" is covered by Rule 60(b)(3) and is therefore limited to a period of one-year, and (2) the alleged "misconduct" occurred not in the treaty tribe status proceedings to be reopened, but in Samish's *separate* recognition proceeding. This ruling ignores well-settled precedent, creates a conflict among the Circuit Courts, vastly expands the scope of relief available under Rule 60(b), and eviscerates the time limit in Rule 60(b)(3).

a. By granting a Rule 60(b) motion based on federal misconduct that occurred many years ago, the Ninth Circuit created a conflict with rulings from its sister Circuits that subsection (6) of Rule 60(b) cannot be used to expand subsections (1) through (3).

Fed. R. Civ. P. 60(b)(3) permits reopener for misconduct of a party:

> On motion and upon such terms as are just, the court may relieve a party or his legal

> representative from a final judgment, order or proceeding for the following reasons: . . . (3) fraud, misrepresentation, or other misconduct of an adverse party . . . ***The motion shall be made . . . not more than one year after the judgment, order, or proceeding was entered or taken***. (Emphasis added.)

Since Samish could not meet the one-year time limit, the Ninth Circuit granted relief under 60(b)(6). That decision is in direct conflict with the multitude of cases from this Court and the Circuit Courts holding that 60(b)(6) cannot be used to expand subsections (1) through (3). *E.g. Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988) ("Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' ***provided that*** the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." (Emphasis added.); *Marquip, Inc. v. Fosber America, Inc.*, 198 F.3d 1363 (Fed. Cir. 1999); *Simon v. Navon*, 116 F.3d 1, 5 (1st Cir. 1997); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir.1989).

The Fourth Circuit explained the policy behind this rule:

> Respect for finality of judgments is deeply ingrained in our legal system. As Justice Story observed, "[i]t is for the public interest and policy to make an end to litigation. . . ." so that "suits may not be immortal, while men are mortal." *Ocean Ins. Co. v. Fields*, 18 F. Cas. 532, 539 (No. 10, 406) (C.C.D. Mass. 1841) (Story, J. sitting as Circuit Judge). *See also Southern Pacific RR Co. v. United States*, 168 U.S. 1, 49 (1897). Equally compelling circumstances may arise, however, in which parties are entitled to be

> relieved of an unjust judgment arrived at through mistake, ignorance, inadvertence or misconduct. . . .
>
> Federal Rule of Civil Procedure 60 provides the terms on which these two principles are balanced. Rule 60(b)(3) allows a court to relieve a party from final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." A motion under 60(b)(3), however, must be made within one year after the judgment was entered. ***Thus, the Rule suggests that equitable considerations prevail in such cases for one year,*** *and that the interest in finality of judgments prevails thereafter.*
>
> We are in complete accord . . . that 60(b)(6) ("any other reason justifying relief") cannot be used to circumvent the one-year limitation for grounds specified previously in the rule. . . .

Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 675 F.2d 1349, 1354-55 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) (emphasis added). In addition, "the one year time limit applicable to the first three clauses of Rule 60(b) would be meaningless if relief was also available under the catchall provision." *Wesco Prods. Co. v. Alloy Automotive Co.*, 880 F.2d 981, 983 (7th Cir. 1989). *Accord Simon v. Navon*, 116 F.3d at 5.

The only time the federal courts allow a challenge based on "fraud or other misconduct" after the one-year time limit has expired is when the conduct is so egregious as to constitute a "fraud on the court." The Circuit Courts have

uniformly held that the concept of "fraud on the court" is to be construed narrowly:

> The federal courts that have struggled with the definition of "fraud on the court" in the context of Rule 60(b) have found such a definition elusive . . . but have generally agreed that the concept should be construed very narrowly. . . . ***The principle concern motivating narrow construction is that the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule.*** . . . Not all fraud is "fraud on the court." . . . "[F]raud on the court" is typically confined to the most egregious cases, such as bribery of a judge or juror, or improper influence exerted on the court by an attorney, in which the integrity of the court and its ability to function impartially is directly impinged. . . .

Great Coastal Express, Inc., 675 F.2d at 1356 (emphasis added) (holding that perjury and fabricated evidence did not constitute a fraud on the court).

The Ninth Circuit's ruling in this case stands this well-established law on its head, and creates a split in the circuits as to when relief is available under Rule 60(b) for "fraud and other misconduct." The United States' treatment of Samish in the context of recognition may have been regrettable, but it has been remedied[11] and certainly does not rise to the level of a fraud on the court. Relief was therefore

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11. Regardless of whether the Ninth Circuit decision is allowed to stand, Samish will still be entitled to all of the federal benefits that flow from federal recognition, such as health care and education benefits, as well as the economic stimulus provided by gaming.

not available under 60(b)(3) or (6), and the Ninth Circuit's decision to allow Samish to re-open is in direct conflict with established law from this Court and the Circuit Courts.

b. By reopening a judgment based on misconduct without requiring Samish to prove that the misconduct prevented Samish from fully and fairly presenting its case to the District Court in 1979, the Ninth Circuit created a conflict with rulings from its sister Circuits that such proof is necessary.

The Circuit Courts have uniformly held that in order to get relief under Rule 60(b) based on fraud or other misconduct of an adverse party, the moving party must prove by clear and convincing evidence that the conduct complained of ***"prevented the losing party from fully and fairly presenting the defense."*** *Harley v. Zoesch*, 413 F.3d 866, 870 (8th Cir. 2005) (emphasis added); *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005); *State Street Bank and Trust Co. v. Inversiones*, 374 F.3d 158, 176 (2nd Cir. 2004), *cert. denied* __ U.S. __ (February 22, 2005); *Cummings v. General Motors Corp.*, 365 F.3d 944, 955 (10th Cir. 2004); *Karak v. Bursaw Oil Corp.*, 288 F.3d 15, 21 (1st Cir. 2002); *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000), *cert. denied*, 531 U.S. 876 (2000).[12] Conduct that occurs ***after*** judgment is entered ***necessarily*** does not affect a party's earlier presentation of its case.[13]

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12. The same principle applies when a movant seeks to set aside a judgment for fraud on the court under Rule 60(b)(6). *E.g., State Street Bank*, 374 F.3d at 176; *Davenport Recycling Associates v. C.I.R.*, 220 F.3d 1255, 1262 (11th Cir. 2000).

13. Petitioners have found only one exception to this rule: Where a party *foregoes* presenting its case, in reliance on a settlement

(Cont'd)

The Ninth Circuit's decision in this case granted relief to Samish on the basis of post-judgment "misconduct" that ***could not***, and ***did not***, prevent Samish from fully and fairly presenting its case to District Court in 1979 and/or to the Ninth Circuit in 1981. The vast majority of the federal misconduct[14] took place after the treaty status of Samish was decided in 1979. Moreover, Samish was represented by highly competent counsel in the proceedings before the Special Master, the District Court, the Ninth Circuit and this Court in its Petition for Certiorari. Nothing the United States might have done hindered the Samish in the presentation of its treaty status case.[15]

By granting re-opening based on the United States' "misconduct" without requiring Samish to prove that the misconduct affected Samish's ability to fully and fairly present its case to the District Court, the Ninth Circuit effectively overruled its own existing precedent and created a conflict with all the other Circuit Courts who have held to the contrary.

(Cont'd)

agreement which is repudiated by the other party more than one year after judgment, 60(b)(6) may provide an avenue of relief. *See United States v. Sparks*, 685 F.2d 1128 (1982). *Sparks* may have been effectively overruled by this Court's decision in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, (1994) (district courts lack jurisdiction to enforce settlement agreements except where order dismissing the action, by agreement of the parties, incorporates terms of settlement agreement or otherwise expressly indicates that court intends to retain jurisdiction over settlement agreement).

14. No misconduct by the Petitioners is alleged, and none exists.

15. In fact, Samish presented the District Court with additional evidence that was not before the Special Master.

c. By re-opening a judgment based on misconduct that did not occur in the course of the proceeding to be re-opened, the Ninth Circuit has vastly expanded the scope of "misconduct" covered by Rule 60(b).

The Ninth Circuit's decision to expand the grounds for relief under Rule 60(b)(6) is made even worse by the fact that the alleged misconduct involved the United States' handling of Samish's federal recognition proceedings, not the United States' handling of the treaty tribe status judgment sought to be re-opened here. Recognition proceedings have "marginal influence at best" on treaty tribe status, because "the Samish may not gain fishing rights from federal recognition alone." *Greene v. United States,* 996 F.2d 973 at 937. In other words, not only has the Ninth Circuit allowed its concern for Samish to create a split in the circuits, it has done so by allowing Samish to prove misconduct in a ***another, separate*** proceeding. The Ninth Circuit's unwarranted expansion of Rule 60(b), as well as the conflict among the Circuit Courts created by the Ninth Circuit's ruling in this case, argue in favor of granting certiorari.

VIEWS OF THE SOLICITOR GENERAL

The Court may want to request the views of the United States Solicitor General on this Petition for Certiorari. The United States was aligned as a party with Petitioners, and may be adversely affected if Samish is allowed to relitigate issues previously decided in this case.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted on behalf of the Petitioning Tribes this 3rd day of October, 2005.

Respectfully submitted,

MASON D. MORISSET
Counsel of Record
MORISSET, SCHLOSSER, JOZWIAK & MCGAW
801 Second Ave., Suite 1115
Seattle, WA 98104-1509
(206) 386-5200

Counsel for Petitioner
The Tulalip Tribes

DANIEL A. RAAS
RAAS JOHNSEN & STUEN, P.S.
1503 E Street, P.O. Box 5746
Bellingham, WA 98227-5746
(360) 647-0234

Counsel for Petitioner
Lummi Nation

ALIX FOSTER
P.O. Box 817
LaConner, WA 98257
(360) 466-7220

Counsel for Petitioner
Swinomish Indian
Tribal Community

TIM WEAVER
TIM WEAVER LAW OFFICE
P.O. Box 487
Yakima, WA 98907
(509) 575-1500

Counsel for Petitioners
Confederated Tribes and Bands of the
Yakama Nation

HAROLD CHESNIN
25944 Community Plaza
WaySedro Wooley, WA 98284
(360) 854-7000

Counsel for Petitioner
Upper Skagit Indian Tribe

LAUREN RASMUSSEN
GENDLER & MANN, LLP
1424 4th Ave, Suite 1015
Seattle, WA 98101
(206) 621-8868

Counsel for Petitioner
the Port Gamble and Jamestown
S'Klallam Indian Tribes

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 6, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-35145

D.C. No.
CV 70-9213 BJR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STATE OF WASHINGTON; SWINOMISH TRIBAL COMMUNITY; NISQUALLY INDIAN TRIBE; PORT GAMBLE S'KLALLAM TRIBE; LOWER ELWHA BAND OF KLALLAMS; JAMESTOWN S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE OF WASHINGTON STATE; UPPER SKAGIT INDIAN TRIBE; LUMMI NATION,

Defendants-Appellees.

SAMISH INDIAN TRIBE,

Applicant in Intervention-Appellant.

Appendix A

Appeal from the United States District Court for the Western District of Washington; Barbara Jacobs Rothstein, District Judge, Presiding

Argued and Submitted
May 3, 2004—Seattle, Washington

Filed Jan. 6, 2005

Before: A. Wallace Tashima, Richard A. Paez, and Carlos T. Bea, Circuit Judges.

OPINION

TASHIMA, Circuit Judge:

Appellant Samish Indian Tribe ("the Samish") sought by means of Federal Rule of Civil Procedure 60(b)(6) to reopen *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash.1979) ("*Washington II*"), *aff'd* 641 F.2d 1368 (9th Cir.1981), a judgment that denied the Samish treaty fishing rights on the ground that the tribe had not maintained an organized tribal structure. The Samish argued that federal recognition[1] of their tribe in 1996 was an extraordinary circumstance that justified reexamining their treaty fishing rights. The district court denied the motion to reopen, holding that federal recognition is of limited relevance to the Samish's treaty fishing rights, that the 1979 judgment was not

1. "Federal recognition" is a process by which the United States government formally acknowledges a government-to-government relationship with a historic tribe. *See* 25 C.F.R. §§ 83.2, 83.12 (2003).

erroneous, and that reopening the judgment would be extremely disruptive. We reverse.

BACKGROUND

In 1855, federal representatives in the Territory of Washington induced a number of Indian tribes to relinquish much of their land in return for payments and the right to keep small parcels of land. *See generally Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 661- 62, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The resulting treaties also preserved the tribes' right to fish "at usual and accustomed grounds." *See, e.g.,* Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927, 928.

A century later, however, runs of fish had become scarce and Native Americans took only a small fraction of the fish harvest. In 1970, the United States brought an action against the State of Washington to force it to protect the tribes' shares of anadromous fish runs. The United States brought the action on its own behalf and as trustee for seven Indian tribes. Another seven tribes successfully intervened in the action. *United States v. Washington,* 384 F.Supp. 312, 327 & nn. 1-2 (W.D.Wash.1974), *aff'd,* 520 F.2d 676 (9th Cir.1975) ("*Washington I*"). The district court ruled that all 14 tribes had fishing rights under various treaties, including the Treaty of Point Elliott, *id.* at 359-82, and that treaty tribes had a right to 50 percent of the harvestable fish passing through their traditional off-reservation fishing grounds. *Id.* at 343.

After the issuance of the decision in *Washington I,* the Samish intervened to assert fishing rights under the Treaty

of Point Elliott. The district judge referred the matter to a magistrate judge, sitting as a special master. After a five-day hearing, the special master found that the Samish were not recognized as an Indian tribe by the United States government and "have not lived as a continuous separate, distinct and cohesive Indian cultural or political community." The special master therefore concluded that the Samish "at this time" were neither a treaty tribe nor a political successor to a treaty tribe and "presently" did not hold treaty fishing rights. The Samish appealed the special master's ruling to the district court, which held a de novo evidentiary hearing. The district court concluded that the Samish were not entitled to treaty fishing rights. *Washington II*, 476 F.Supp. at 1106.

In arriving at this conclusion, the district court adopted and relied on findings of fact proposed by the United States. Those findings concerned the Samish's lack of an organized tribal structure, and included the following:

- The Samish Tribe "exercises no attributes of sovereignty over its members or any territory."
- It is not recognized by the United States as a tribe.
- Neither its organization nor its membership has been recognized by the Congress or the Department of the Interior for Indian affairs purposes.
- The Secretary of the Interior has not prepared an official membership roll for the tribe.

Appendix A

- "There is no requirement of specific minimum blood quantum either as to Samish blood in particular or Indian blood in general."

- Many tribe members "are of only 1/16th degree Indian blood" and "[t]wo have only 1/32nd Samish blood."

- "The tribe does not prohibit dual membership and at least one member is an officer of the Lummi tribe."

- The Samish members "do not and have not lived as a continuous separate, distinct and cohesive Indian cultural or political community."

Id. After making these findings about the Samish, the district court stated as a conclusion of law that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States." *Id.* at 1111.[2] The district court therefore concluded that "at this time" the Samish was not a treaty tribe and "presently" did not hold treaty fishing rights. *Id.*

We affirmed the district court in a divided decision, noting that "[w]e have defined a single necessary and

2. This conclusion is surprising given that in *Washington I* the district court determined that the Stillaguamish Tribe and the Upper Skagit Tribe were treaty tribes, although neither was federally recognized at the time. *See* 384 F.Supp. at 378-79.

sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir.1981) ("*Washington III* "). In determining whether this condition exists, we examine the organizational structure of the tribe at the time of the treaty signing with allowances for inevitable adaptation and assimilation: "tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73. Although the district court had erred in concluding that a tribe must be federally recognized in order to exercise treaty fishing rights, we held that the district court's findings of fact were not clearly erroneous and they provided some support for the conclusion that the Samish had not maintained an organized tribal structure.[3] *Id.* at 1373-74.

Because the Samish's inability to exercise their treaty fishing rights hinged on their status as an unrecognized tribe, and because the United States, tribes that opposed the Samish's exercise of treaty fishing rights, and the district court all suggested that future federal recognition might

3. In dissent, Judge Canby argued that the district court's factual findings could not be so easily severed from its erroneous belief in the necessity of federal recognition. 641 F.2d at 1374-75 (Canby, J., dissenting). Indeed, many of the findings simply reflected the Samish's lack of federal recognition. *Id.* at 1375. Because the district court's findings were insufficient to answer the proper legal inquiry, whether the Samish had "maintained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions," *id.* at 1374, Judge Canby would have remanded the case for further findings of fact. *Id.* at 1375-76.

warrant reexamination of the Samish's treaty fishing rights,[4] the Samish continued their pursuit of federal recognition. The Samish had first sought federal recognition in 1972, three years after a Bureau of Indian Affairs ("BIA") employee removed the Samish from a list used to determine whether a tribe was federally recognized. *See Greene v. Babbitt*, 943 F.Supp. 1278, 1281, 1284 (W.D.Wash.1996).[5] The Department of the Interior took no action on the Samish's application until 1979, and in 1987 the BIA issued a final decision denying tribal recognition of the Samish. *See* Final Determination That the Samish Indian Tribe Does Not Exist as an Indian Tribe, 52 Fed.Reg. 3709 (Feb. 5, 1987).

The Samish then filed an action challenging the BIA's denial of federal recognition. The Tulalip Tribe sought to

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4. For example, the government argued that "should [the Samish] succeed in obtaining 'acknowledgment' of their current status as [an] 'Indian tribe[ ]' in the pending administrative proceedings, this might justify an application to re-open the present judgment against them." Brief for United States in Opposition to Petition for a Writ of Certiorari, *Duwamish Tribes v. Washington*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982) (No. 81-509). Likewise, rather than ruling that the Samish no longer held treaty fishing rights, the district court ruled that the Samish "presently" did not hold such rights. *Washington II*, 476 F.Supp. at 1111.

5. Until the Department of the Interior adopted acknowledgment regulations in 1978, *see* 25 C.F.R. §§ 83.1-83.13 (2003), the federal government decided on an ad hoc basis which groups of Indians would be recognized as tribes. *See* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 New Eng. L.Rev. 491, 491 (2003).

intervene in that proceeding, arguing that federal recognition of the Samish would lead to a dilution of the Tulalip's fishing rights. The district court denied the Tulalip's intervention motion and, in an interlocutory appeal, we affirmed the denial. *Greene v. United States*, 996 F.2d 973, 975 (9th Cir.1993). We held that although the federal recognition and treaty fishing rights inquiries were similar, "each determination serves a different legal purpose and has an independent legal effect." *Id.* at 976. We noted that even if the Samish achieved federal recognition, the tribe would need to challenge the decision in *Washington II* before it could exercise fishing rights. *Id.* at 977.[6]

On the merits of the Samish's challenge to the denial of federal recognition, the district court vacated the BIA's decision and remanded the case for a formal adjudication under the Administrative Procedures Act. *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059, at *9 (W.D.Wash. Feb.25, 1992), *aff'd, Greene v. Babbitt*, 64 F.3d 1266 (9th Cir.1995). After an eight-day hearing, an Administrative Law Judge ("ALJ") found that the Samish met all of the criteria necessary for federal recognition. The BIA rejected some of the ALJ's findings and conclusions, but ruled in favor of Samish recognition. *See* Final Determination for Federal Acknowledgment of the Samish Tribal Organization as an Indian Tribe, 61 Fed.Reg. 15,825 (Apr. 9, 1996). The district

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6. In dissent, Judge Reinhardt argued that if the Samish qualified for federal recognition, they necessarily also qualified for treaty fishing rights. 996 F.2d at 981 (Reinhardt, J., dissenting). Judge Reinhardt also noted that, as a practical matter, federal recognition "will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights." *Id.* at 982.

court reinstated the deleted findings and conclusions, however, and affirmed the recognition decision. *Greene v. Babbitt*, 943 F.Supp. at 1288- 89. The district court also noted that the Samish's "long journey for recognition has been made more difficult by excessive delays and governmental misconduct." *Id.* at 1281.

On August 23, 2002, the Samish filed with the district court a Rule 60(b)(6) motion to be relieved of the judgment in *Washington II*. The United States and nine tribes whose treaty fishing rights were confirmed in *United States v. Washington* ("the Opposition Tribes") opposed the Samish's motion. The district court held that federal recognition was not an extraordinary circumstance, reasoning that "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights." *United States v. Washington*, No. CV 70-09213, Subproceeding No. 01-2, slip op. at 13, 16 (W.D.Wash. Dec. 19, 2002). The district court also noted that the Samish had not alleged that the *Washington II* proceeding was fundamentally unfair or that the Samish had been prevented from adducing evidence in support of its claim. The interest in finality was an equally compelling factor that weighed against reopening, given "the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans." *Id.* at 17.

The Samish filed a motion for reconsideration of the district court's ruling. In the motion, the Samish included a proposal that addressed the possible disruptions that its intervention in *Washington I* might cause. The district court denied the motion, reaffirming its conclusion that federal

recognition is not an extraordinary circumstance and that the interest in finality remained an overriding concern. This appeal followed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review the denial of a Rule 60(b) motion for an abuse of discretion. *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1108 (9th Cir.2003). Under the abuse of discretion standard, we must affirm the judgment below unless (1) we "have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors," (2) the district court applied the wrong law, or (3) the district court rested its decision on clearly erroneous findings of material fact. *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir.2001).

ANALYSIS

I. Did the District Court Abuse Its Discretion By Ruling that Federal Recognition of the Samish Was Not an Extraordinary Circumstance?

The Samish contend that the district court abused its discretion by ruling that federal recognition was not an extraordinary circumstance that warranted reopening the judgment in *Washington II*. The Samish argue that this abuse of discretion resulted from errors of law.

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may

relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment." The Rule 60(b)(6) catchall provision applies only when the reason for granting relief is not covered by any of the other reasons set forth in Rule 60. *Cmty. Dental Servs. v. Tani,* 282 F.3d 1164, 1168 & n. 8 (9th Cir.2002). It "has been used sparingly as an equitable remedy to prevent manifest injustice" and "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.,* 984 F.2d 1047, 1049 (9th Cir.1993). Thus, a party seeking to reopen a case under Rule 60(b)(6) "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion." *Cmty. Dental Servs.,* 282 F.3d at 1168.

The Samish argue that the district court misinterpreted our precedents in ruling that "a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights." It is well-settled that federal nonrecognition cannot divest a tribe of treaty rights. In *Washington I,* we held that "[n]onrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights." 520 F.2d at 692-93. In *Washington III,* we held that the district court's view that federal recognition is required "is clearly contrary to our prior holding and is foreclosed by well-settled precedent." 641 F.2d at 1371; *see also Greene v. United States,* 996 F.2d at 976 (noting that "[f]ederal recognition is

not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott").

Although we have previously held that federal recognition is not *necessary* for the exercise of treaty fishing rights by a signatory tribe, we have never held that federal recognition is not a *sufficient* condition for the exercise of those rights. Indeed, our precedent leads us to the inevitable conclusion that federal recognition is a sufficient condition for the exercise of treaty rights. We have "defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Washington III*, 641 F.2d at 1372. "For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community." *Id.* at 1372-73.

The mandatory criteria for federal recognition include the following:

> (b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
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> . . .
>
> (c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

25 C.F.R. § 83.7.[7] The Samish argue persuasively that because they met the mandatory criteria for federal recognition, they necessarily met the condition for the exercise of treaty rights. *See Greene v. United States*, 996 F.2d at 981 (Reinhardt, J., dissenting) (arguing that "[i]f the single *necessary and sufficient* criterion for treaty rights is also a *necessary* condition for federal recognition, then achieving the latter necessarily satisfies the single qualification for the former").

Indeed, we have never held that recognition of a tribe—as opposed to nonrecognition—is irrelevant to its exercise of treaty rights, despite some dicta to the contrary. *See Greene v. Babbitt*, 64 F.3d at 1270 (incorrectly asserting that in *Washington I* "we held that a tribe's recognition or lack of recognition by the Secretary of the Interior does not determine whether the tribe has vested treaty rights"). This is not surprising, given the traditional deference that the federal courts pay to the political branches in determining whether a group of Indians constitutes a tribe. *See United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419, 18 L.Ed. 182 (1865) (holding that"[i]f by [the executive and other political departments of the government] those Indians are recognized as a tribe, this court must do the same"); *Washington I*, 384 F.Supp. at 400 (concluding that "[t]he recognition of a tribe as a treaty party or the political successor in interest to a treaty party is a federal political question on which state authorities and federal courts must follow the determination by the legislative or executive branch of the Federal Government"); William C. Canby, Jr., *American Indian Law in a Nutshell* 6 (4th ed. 2004) ("Once granted, . . . the

7. The regulations define "historical" as "dating from first sustained contact with non-Indians." 25 C.F.R. § 83.1.

recognition will bind the courts until it is removed by the Executive or Congress.").[8]

It would be a rare case indeed where a court would deny treaty rights to a signatory tribe on the ground that it lacks an organized tribal structure, where the Department of the Interior has recognized that same tribe as a "distinct community [that] has existed as a community from historical times until the present" and that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7; *see also* Felix S. Cohen, *Handbook of Indian Law* 5 (1982 ed.) ("No congressional or executive determination of tribal status has been overturned by the courts. . . .").

The district court erred in concluding that, because nonrecognition cannot impact vested treaty rights,

8. Indeed, the United States argued in *Washington III* that "[w]hile recent cases have indicated that the federal government's failure to recognize a tribe is not dispositive, *positive* recognition by the United States is accorded great deference and may well be controlling." Brief for United States in Opposition to Petition for a Writ of Certiorari, *Duwamish, Samish, Snohomish, Snoqualmie & Steilacoom Indian Tribes v. Washington*, 454 U.S. 1143, 102 S.Ct. 1001, 71 L.Ed.2d 294 (1982) (No. 81- 509) (emphasis added). The United States also noted that "[w]here the Congress or executive branch has expressly recognized a group of Indians as a tribe, the courts have repeatedly deferred to this essentially political decision" and that "*where there has been no such recognition*, a district court may make a factual inquiry into 'whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure.' " Brief for the Federal Appellees, *Washington III*, 641 F.2d 1368 (9th Cir.1981) (No. 79-4447, 79-4472) (emphasis added).

recognition is irrelevant. The Samish would almost certainly have won the right to exercise its treaty fishing rights had the tribe been federally recognized at the time of *Washington II*. And although we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights,[9] this is an inevitable conclusion.

Although federal recognition is for all practical purposes determinative of whether the tribe has maintained an organized tribal structure, the Opposition Tribes argue that the Samish's federal recognition is still not an extraordinary circumstance. That is, the relevance of the Samish's federal recognition is not the *fact* of the recognition itself, but rather the *factual findings* underlying that recognition, and whether the Samish had a full opportunity to present the facts supporting its treaty status to the district court in *Washington II*. That an ALJ arrived at different factual findings on better evidence is not a reason for granting a Rule 60(b)(6) motion. *See Alpine Land & Reservoir Co.*, 984 F.2d at 1049 (holding that Rule 60(b)(6) "is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment").

The crucial issue here is whether the fact that the Samish had the opportunity to litigate the factual basis underlying

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9. In extreme circumstances, courts may be able to overturn the decision to recognize a tribe. *See Baker v. Carr*, 369 U.S. 186, 216-17, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (in dicta) ("Able to discern what is 'distinctly Indian,' the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." (citing *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107 (1913))).

the tribe's treaty status in *Washington II* means that the Samish were not "prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion." *Cmty. Dental Servs.*, 282 F.3d at 1168. In light of the government's "excessive delays and . . . misconduct" in withholding of recognition from the Samish, a circumstance beyond their control; the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boiler-plate findings of fact in *Washington II*, we conclude that the Samish were effectively prevented from proving their tribal status "in a proper fashion."

For its part, the government argues that *Washington II* should not be reopened, because the judgment is not inconsistent with the federal recognition of the Samish. That is, the federally recognized Samish may have existed since historical times as a distinct group, enjoy a government-to-government relationship with the United States, and yet still not be the successor to the Samish Tribe that was a signatory to the Treaty of Point Elliott, because the Swinomish Indian Tribal Community and the Lummi Nation are the political successors to the treaty-time Samish.

The government's position is inconsistent with our precedent. In *Washington III*, we "defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." 641 F.2d at 1372. Yet the government in essence argues that this "single

necessary and sufficient condition" is necessary but not sufficient. It is undisputed that the Samish were a party to the Treaty of Point Elliott. *See*, e.g., *Washington II*, 476 F.Supp. at 1106. It is also clear that the Samish "has been continuously identified throughout history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe." 61 Fed.Reg. 15825, 15826.[10] As the Samish are a signatory tribe and have proved the single necessary and sufficient condition for the exercise of treaty rights, the res judicata effect of *Washington II* is all that is keeping the Samish from pursuing its treaty rights.[11]

Moreover, no tribe can be the political successor to the Samish unless that tribe merged or consolidated with the

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10. One commentator has explained that by acknowledging a tribe, the Department of the Interior "is not 'granting' sovereign status or powers to the group, nor is it creating a tribe made up of its Indian descendants. . . . Rather, the Department is acknowledging that the sovereign has existed continuously since historic times, retaining its inherent powers." Coen, *Tribal Status Decision Making*, 37 New Eng. L.Rev. at 499.

11. *United States v. Oregon*, 29 F.3d 481 (9th Cir.1994), is not to the contrary. There, the issue was whether constituent tribes of the federally recognized Colville Confederacy had abandoned treaty rights by breaking away from the Yakima Nation and Nez Perce Tribe, the beneficiaries of treaty fishing rights in the Yakima Treaty and The Nez Perce Treaty. *Id.* at 486-87. In the Treaty of Point Elliott, by contrast, each individual party tribe was guaranteed fishing rights. *See* 12 Stat. at 928.

Samish. *See United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 (9th Cir.1990) (holding that "for a signatory tribe to obtain treaty tribe status from another signatory tribe, it must first show that the two tribes or cohesive bands thereof consolidated or merged and demonstrate also that together they maintain an organized tribal structure"). The district court in *Greene v. Babbitt* specifically reinstated a finding by the ALJ that the Samish and the Swinomish had not merged, 943 F.Supp. at 1288 & n. 13, and the fact that some members of the Swinomish and Lummi tribes have Samish ancestry does not make them political successors to the Samish. *See Oregon*, 29 F.3d at 484. To the extent that the district court in *Washington I* found that the Samish had merged or combined with the Lummi and the Swinomish,[12] this is clearly inconsistent with the federal recognition of the Samish. *See* 25 C.F.R. § 83.7(c) (identifying one of the mandatory criteria for recognition as the petitioner's maintenance of "political influence or authority over its members as an autonomous entity from historical times until the present").

We conclude that the district court misinterpreted our precedents, and thereby abused its discretion, in ruling that

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12. The district court found that"[t]he present Lummi Tribe also includes descendants of the Semiahmoo and Samish Indians of 1855." *Washington I*, 384 F.Supp. at 360. Without naming the Samish, the district court found that "[t]he intervenor Swinomish Indian Tribal Community is the presentday tribal entity which, with respect to the matters that are the subject of this litigation, is a political successor in interest to certain tribes and bands and groups of Indians which were parties to the Treaty of Point Elliott. . . ." *United States v. Washington*, 459 F.Supp. 1020, 1039(W.D.Wash.1978).

the fact of federal recognition had no impact on whether the Samish may exercise treaty fishing rights. Federal recognition is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty fishing rights in *Washington II*. As the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*.

II. Do the District Court's Finality Concerns Independently Support Its Denial of the Samish's Rule 60(b)(6) Motion?

Although we conclude that federal recognition of the Samish constitutes an extraordinary circumstance for purposes of Rule 60(b)(6), we still must decide whether the district court's finality concerns independently justify its denial of the Samish's motion.

The Samish argue that the district court abused its discretion by failing to balance finality concerns against the interest in achieving justice. The district court stated that the motion raised two principal issues: (1) whether extraordinary circumstances justified reopening the judgment, and (2)"whether the interests in finality are paramount to other interests." Having concluded that the lack of extraordinary circumstances was an independent basis for denying relief, the district court did not balance finality concerns but rather stated that they were "[a]n equally compelling factor."

In discussing the interest in finality, the district court stated:

> The United States and the Opposition Tribes point out that, in reliance on *Washington II,* this court has approved many state-tribal fish management plans, mediated and decided intertribal disputes on treaty fishing issues, determined treaty tribes' usual and accustomed fishing places, and decided allocation issues. The United States and Opposition Tribes rightly observe that management of fish harvest involves a delicate balancing of interests within the overall framework and that these management plans—achieved after considerable time and expense—would be upset by the addition of another Tribe at this late stage.
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> . . . The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans.

(Citation omitted.) The district court also noted that the interest in finality is at its zenith in natural resource allocation cases.

In its motion for reconsideration, the Samish included a proposal to minimize possible disruptions that its participation in *Washington I* would entail. The Samish noted that three of the tribes participating in *Washington I* had

established themselves as successors in interest to Samish treaty rights, and the Samish "would agree to exercise treaty fishing rights under the orders in the case that apply to these three tribes, and under the regulatory authority and framework of the three tribes." Under this proposal, the Samish argued, their inclusion would not disrupt existing orders.

Despite "the Samish's efforts to craft a workable, minimally disruptive framework for the Tribe's intervention," the district court remained unconvinced: "Under any scenario, the Samish, in addition to the other newly recognized Tribes likely to seek intervention, would necessarily inject themselves into sensitive agreements and upset current treaty tribes' allocations." The district court then hedged its conclusion somewhat by pointing out that finality concerns "were not the sole or even the chief basis for denying the tribe's motion to reopen," and that "[t]o focus on mitigating the effects of reopening a judgment, rather than on whether reopening a judgment is procedurally allowable, is to put the cart before the horse." It also noted that "even putting aside the finality concerns . . . , there are ample reasons to deny the Tribe another chance at litigating its treaty status."

Because it is unclear to what extent the district court relied on finality concerns in denying the Samish's motions, especially after the Samish submitted a proposal for minimizing the disruptive effects of its participation in *Washington I*, we conclude that finality concerns do not independently support the district court's denial of the Samish's Rule 60(b)(6) motion. That is, had the district court properly concluded that federal recognition was an

extraordinary circumstance the somewhat speculative concerns about finality are insufficient to have carried the day.

The Opposition Tribes' point is well taken that "[h]aving supervised the litigation since 1970, the district court is in the best position to judge the impact adding new parties might have."[13] Nevertheless, the fact that the district court has ongoing judicial supervision of *Washington I* undercuts these finality concerns. Unlike a judgment between private parties, the allocation of natural resources between treaty tribes and others cannot help but be an ongoing venture. Indeed, the 17,500 docket entries and more than 50 separately-numbered sub-proceedings in *Washington I* are testament to the inherent *lack* of finality of the judgment. Finally, the fact that the government and the Opposition Tribes in *Washington II* argued that Samish recognition could well justify reopening further weakens finality concerns.

CONCLUSION

For the foregoing reasons we reverse the order of the district court denying the Samish's Rule 60(b)(6) motion and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

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13. We note, however, that a number of different district judges have presided over various parts of this case in the 34 years that it has been pending in the Western District of Washington.

Appendix A

BEA, Circuit Judge, dissenting.

Appellant Samish Indian Tribe ("Samish Tribe") appeals the district court's order denying the Samish Tribe's motion pursuant to Federal Rule of Civil Procedure 60(b)(6) for relief from the district court's prior judgment in *United States v. Washington*, 476 F.Supp. 1101 (W.D.Wash.1979), *aff'd*, 641 F.2d 1368 (9th Cir.1981) ("*Washington II*"). The majority opinion holds that the district court abused its discretion in denying the Samish Tribe's Rule 60(b)(6) motion because "[f]ederal recognition [of the Samish Tribe] is determinative of the issue of tribal organization, the issue upon which the Samish were denied treaty fishing rights in *Washington II*," and "[a]s the Samish's lack of recognition was a circumstance beyond the tribe's control, their subsequent recognition is an extraordinary circumstance that warrants setting aside the judgment in *Washington II*." Op. at 1161.

With respect, I believe the majority opinion errs in two regards. *First*, federal recognition as a tribe has never been required to establish off-reservation fishing rights pursuant to the Treaty of Point Elliott (1855), and the Samish Tribe was not precluded in *Washington II* from presenting evidence of having maintained an organized tribal structure, which evidence could have supported a finding that it was entitled to such treaty fishing rights. *Second*, neither the federal recognition of the Samish Tribe by the Bureau of Indian Affairs ("BIA") nor the BIA's underlying factual findings constitute evidence that the Samish Tribe maintained an organized tribal structure to which a district court determining treaty status must accord any deference. Because I believe

the majority opinion departs from our jurisprudence in holding otherwise,[1] I respectfully dissent.

I.

A.

The issue before this court is not whether the Samish Tribe might qualify for off-reservation fishing rights pursuant to the Treaty of Point Elliott were it to commence an action today. Rather, as the majority opinion states: "The crucial issue here is whether the fact that the Samish had the opportunity to litigate this issue in *Washington II* means that the Samish were not 'prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion.'" Op. at 1159 (internal citation omitted). The majority opinion answers in the negative; I believe our precedent requires an affirmative answer.

Our precedent in this area of the law and with regard to the very parties at issue here makes clear, if nothing else, that whether a group of Native Americans are recognized as a tribe by the federal government is a distinct legal inquiry from whether that same group of Native Americans qualify

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1. Except "'when an intervening Supreme Court decision undermines an existing precedent of the Ninth Circuit, and both cases are closely on point,'" "[a] three-judge panel generally has no power to overrule a decision of this court." *Rotec Industries, Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1122 n. 3 (9th Cir.2003). Rather, "[s]uch a ruling may be handed down [only] by an en banc panel of this court or the United States Supreme Court (and state high courts on issues of state law)." *Id.*

for off-reservation fishing rights pursuant to the Point Elliott and related treaties. Further, recognition as a tribe is *not* a necessary precondition to qualify for such treaty fishing rights.[2]

Thus, in *United States v. Washington*, 520 F.2d 676, 692-93 (9th Cir.1975) ("*Washington I*") (emphasis added), we held: "Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, *but can have no impact on vested treaty rights.*" Likewise, when the district court in *Washington II* held that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise the tribal fishing rights secured and protected by the treaties of the United States," 476 F.Supp. at 1111, we held on appeal:

> This conclusion is clearly contrary to our prior holding and is foreclosed by well-established precedent. . . .
>
> * * *
>
> We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure.

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2. This precedent in no way renders federal recognition a nullity. Rather, "[f]ederal recognition brings its own obvious rewards, not the least of which is the eligibility of federal money for tribal programs, social services and economic development." *Greene v. United States*, 996 F.2d 973, 978 (9th Cir.1993) ("*Greene I*").

Washington II, 641 F.2d at 1371, 1372; *accord id.* at 1374 (Canby, J., dissenting) ("The majority opinion quite correctly rejects the conclusion of law that federal recognition is essential to the exercise of treaty rights."). In *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 776 n. 10 (9th Cir.1990) (emphasis added), we noted that "*[f]ederal recognition by the Department of Interior is not required for a tribe to obtain treaty tribe status.*" Again, in *Greene I*, "[w]e recognize[d] that the two inquiries are similar," but reiterated that "each determination serves a different legal purpose and has an independent legal effect" and that "*[f]ederal recognition is not a threshold condition a tribe must establish to fish under the Treaty of Point Elliott.*" 996 F.2d at 976 (emphasis added); *accord id.* at 981 (Reinhardt, J., dissenting) (arguing that "federal recognition *necessarily* qualifies for treaty rights a tribe that claims them," but acknowledging that "federal recognition is not a precondition to receiving treaty rights") (emphasis in original). Finally, in *Greene v. Babbitt*, 64 F.3d 1266, 1270 (9th Cir.1995) ("*Greene II*"), we reviewed our precedent and held once more: "[T]he recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights. . . . Our decision in [*Greene I*] can leave no serious doubt that our court regards the issues of tribal treaty status and federal acknowledgment as fundamentally different."[3]

Our precedent is equally clear that although recognition as a tribe may be a decision generally left to the discretion of

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3. In light of this precedent, the majority opinion's statement that "the Samish's inability to exercise their treaty fishing rights hinged on their status as an unrecognized tribe," Op. at 1155, is inexplicable.

the Executive Branch, "[w]hether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure [so as to qualify for off-reservation fishing rights pursuant to the Point Elliott and related treaties] is a factual question which a district court is competent to determine." *Washington I*, 520 F.2d at 693; *accord Washington II*, 641 F.2d at 1371.

Thus, the fact alone that the Samish Tribe was not recognized by the federal government at the time of *Washington II* in no way prevented it from proffering the type of evidence that could have resulted in a finding by the district court in *Washington II* that the Samish Tribe had maintained an organized tribal structure and, therefore, was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott. Indeed, two other tribes did precisely this. Specifically, in *Washington I*, the district court held that the Stillaguamish Tribe and Upper Skagit Tribe were both entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott *despite the fact that they were not at the time recognized as tribes by the federal government. United States v. Washington*, 384 F.Supp. 312, 378-79, 406 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir.1975) ("*Washington I*"). We affirmed:

> The Stillaguamish and Upper Skagit Tribes ... are not recognized as organized tribes by the federal government. . . . Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the

Appendix A

Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Washington I, 520 F.2d at 692-93. Nor, finally, has the Samish Tribe alleged, much less proved, that the evidence demonstrating that it was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott was unavailable at the time of the trial held in *Washington II* to adjudicate this issue.

Because the Samish Tribe has presented no evidence that it was precluded from doing precisely what the Stillaguamish and Upper Skagit Tribes did, it has not shown that it was "'prevented . . . from proceeding with the prosecution or defense of the action in a proper fashion,'" Op. at 1159, such that its recognition as a tribe now should permit it to set aside the judgment in *Washington II.*[4]

B.

Despite this clear, consistent and controlling authority, the majority opinion "conclude[s] that the Samish were effectively prevented from proving their tribal status 'in a proper fashion'" for three reasons:

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4. Nor, as the majority opinion recognizes, is the fact "[t]hat an ALJ arrived at a different factual finding [as to federal recognition] on better evidence . . . a reason for granting a Rule 60(b)(6) motion. *See Alpine Land & Reservoir Co.,* 984 F.2d at 1049 (holding that Rule 60(b)(6) 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment')." Op. at 1159.

> [1] the government's 'excessive delays and . . . misconduct' in withholding of recognition from the Samish, a circumstance beyond their control; [2] the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue; and [3] the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boilerplate findings of fact in *Washington II*. . . .

Slip op. at 122. But none of these factors supports granting the Samish Tribe's Rule 60(b)(6) motion.

First, although the Samish Tribe initially applied for federal recognition in 1972 and were not finally recognized until 1996, whether the Samish Tribe was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott was an issue tried and submitted before the district court in *Washington II* in 1977. *Greene v. Babbitt,* 943 F.Supp. 1278, 1281 (W.D.Wash.1996) ("*Greene III*") (date of initial application for federal recognition); 61 Fed.Reg. 15825 (date of federal recognition); *Washington II,* 641 F.2d at 1371 n. 4 (date of submission before district court). Thus, the majority if not all of the "'excessive delays and . . . misconduct,'" Op. at 1159, on which the majority opinion relies occurred after the issue was tried and submitted in *Washington II.*

Further, as noted above, there is no showing that the five-year delay immediately following the Samish Tribe's application for federal recognition to the BIA precluded the

Samish Tribe from submitting to the district court in *Washington II* the same evidence of having maintained an organized tribal structure that it had submitted or thereafter would submit to the BIA. Nor is there evidence that the Samish Tribe applied for a postponement of their treaty-rights trial and submission to allow the BIA to determine its recognition claim.

Second, "the government's position in *Washington II* that federal recognition was necessary and that future federal recognition might justify revisiting the treaty rights issue," Slip op. at 122, is irrelevant to whether a case is made out for Rule 60(b)(6) relief. The government's position in no way hindered, much less precluded, the Samish Tribe from offering evidence in the *Washington II* district court trial of having maintained an organized tribal structure that could have resulted in a finding by that district court that the Samish were entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott, as did the unrecognized Stillaguamish and Upper Skagit Tribes. Nor can the Samish Tribe claim the government is estopped to require evidence of having maintained an organized tribal structure by its statement that the issue of treaty rights might be subject to review were the Samish Tribe federally recognized. Any reliance on these statements was unreasonable in view of our holdings. As noted above, even prior to *Washington II*, we had held in *Washington I* that federal recognition as a tribe is *not* a necessary precondition for off-reservation fishing rights pursuant to the Treaty of Point Elliott and that district courts are competent to make the necessary determinations:

> The Stillaguamish and Upper Skagit Tribes . . . are not recognized as organized tribes by the

> federal government. . . . Nonrecognition of the tribe by the federal government and the failure of the Secretary of the Interior to approve a tribe's enrollment may result in loss of statutory benefits, but can have no impact on vested treaty rights. Whether a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure is a factual question which a district court is competent to determine.... Evidence supported the court's findings that the members of the two tribes are descendants of treaty signatories and have maintained tribal organizations. We therefore affirm the district court's conclusion that the Stillaguamish and Upper Skagit Tribes are entities possessing rights under the Treaty of Point Elliott.

Washington I, 520 F.2d at 692-93 (internal citations omitted). Accordingly, in *Washington II*, we characterized arguments otherwise as "*clearly* contrary to" and "foreclosed by *well-settled* precedent." 641 F.2d at 1371 (emphasis added).

Third, nor is "the district court's erroneous conclusion that nonrecognition was decisive and wholesale adoption of the United States' boilerplate findings of fact in *Washington II*," Op. at 1159, relevant. On appeal, as noted above, we expressly corrected the district court's erroneous conclusion. *Washington II*, 641 F.2d at 1371 ("[The district court's] conclusion is clearly contrary to our prior holding and is foreclosed by well-settled precedent."). Noting that "[t]he district court's statement that federal nonrecognition is decisive, together with its listing of other purported considerations,

makes it difficult for us to determine the precise basis for the court's holding that the tribes may not exercise treaty rights," we then "examine[d] the record" ourselves "to determine whether the district court reached the correct result." *Id.* at 1372.

> [T]he district court specifically found that the appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communit(ies).'
>
> *After close scrutiny, we conclude that the evidence supports this finding of fact.* Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required.
>
> The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood. That may be true of some members of tribes whose treaty status has been established. But unlike those persons, those who comprise the groups of appellants have not settled in distinctively Indian residential areas.
>
> We cannot say, then, that the finding of insufficient political and cultural cohesion is clearly erroneous.

Washington II, 641 F.2d at 1373-74 (emphasis added; internal citations omitted).

Indeed, the argument that the district court's erroneous conclusion of law in *Washington II* so "permeated the entire factual history," *id.* at 1375 (Canby, J., dissenting), that the findings of fact could not be relied upon even by this court when it applied the correct standard is one that was heralded by the dissent in *Washington II* and, as demonstrated above, rejected by the majority:

> My difference with the majority is that I am unable to say that the findings of the district court resolve the determinative question of tribal continuity or provide us with the means to do so upon review.
>
> * * *
>
> [T]he conclusions of law help to illustrate the deficiencies of the findings of fact upon which the decision of the district court is based. The findings that appellants had not maintained a 'continuous separate, distinct and cohesive Indian cultural or political communit(ies)' or 'organized tribal structure(s) in a political sense' amounted in context to findings that appellants lacked federal recognition or attributes necessarily dependent upon federal recognition. These findings consequently do not resolve the crucial factual issue and cannot support the judgment. Application of the proper legal standards to this case requires new determination of fact, and

> possibly additional evidence relating to the political organization of the relevant tribes at treaty times. I would therefore remand the matter to the district court for determinations whether appellants have maintained tribal structures reflecting the degree of organization that existed at the time of the treaties, with reasonable allowances for adaptation to changing conditions, and whether some defining characteristic of the original tribes persists in appellants as evolving tribal communities.

Id. at 1374, 1375-76 (Canby, J., dissenting). The majority opinion recognizes that this is an argument already made and rejected, Op. at 1155 n. 3, but pays no heed to the crucial finding of not having maintained an organized tribal structure, approved by our decision. Such insouciance to our precedent is inadvisable.

II.

Although acknowledging that "we have never explicitly held that federal recognition necessarily entitles a signatory tribe to exercise treaty rights," the majority opinion asserts that "this is an inevitable conclusion." Op. at 1158. Again, this is contrary to our precedent.

In *Greene I*, what was thereafter recognized as the Samish Tribe appealed to the district court from the BIA's denial of the Samish Tribe's petitions for recognition. 996 F.2d at 975. The Tulalip Tribe moved to intervene, asserting "two related interests": (1) "that their treaty fishing allocations are

threatened by dilution" because the "renewed administrative inquiry into the Samish tribal status will raise nearly identical questions" as those relevant to the Samish Tribe's treaty status; and (2) that "parallel determinations by the BIA will undermine the precedential effect" of *Washington I* and *Washington II*. *Id.* at 976-77.

The district court denied the motion, holding "that the action did not implicate treaty claims," and we affirmed. *Id.* at 975. As to the first asserted interest, we held that federal recognition "serves a different legal purpose and has an independent legal effect" than does a determination whether the Samish Tribe has treaty rights: "Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and Washington II* before they could claim fishing rights." *Id.* at 976-77. As to the second asserted interest, we noted that "the district court ruled expressly that the ALJ 'will not consider' treaty rights" and "that the Samish may not use the reopened hearing [on federal recognition] to attack the [*Washington II*] decision." *Id.* at 977. Further, it held that "[a]ny attempt to relitigate treaty fishing rights would occur in the separate, ongoing *Washington I* forum, where the Tulalip are already parties." *Id.* We continued: *Washington I*" is the forum that will resolve ultimately any attempt to reallocate treaty fishing rights and that is the forum where the Tulalip *and all other interested parties* can have their say." *Id.* at 977-78 (emphasis in original).

Our holding in *Greene I* that the proper fora—if any--to relitigate the Samish Tribe's treaty rights were *Washington I and Washington II* and our promise to the Tulalip Tribe

that it would have an opportunity to protect its interests in those fora compels the conclusion that federal recognition does *not* necessarily entail treaty status. Indeed, this is clearly what we meant when we said: "Allowing the Tulalip to intervene would only further confuse the issues and postpone what may be inevitable: a direct challenge to the allocation of treaty fishing rights, *which would be fully and independently litigated in the Washington I forum.*" *Id.* at 978 (emphasis added). It would have been an empty promise—indeed, a complete deprivation of due process—to deny the Tulalip Tribe's motion to intervene in the Samish BIA recognition proceedings on the basis that it could later protect its treaty rights in the *Washington I and Washington II* courts, while all along assuming that by virtue of the Samish Tribe gaining federal recognition, the *Washington I and Washington II* courts would be required to grant the Samish Tribe treaty rights. If that was the case, where then was the Tulalip Tribe to protect its interests? Elementary principles of due process, such as the right to present evidence and to be heard before property rights are taken, require that a tribe challenging the Samish Tribe's claims to treaty rights have an opportunity to disprove the maintenance of organized tribal structure and not be precluded from offering such proof by an administrative agency determination from which the challenging tribe was excluded.

Indeed, the majority opinion's "inevitable conclusion," Op. at 1158, is precisely the argument advanced by the dissent in *Greene I*, and rejected by the majority opinion there. Dissenting, Judge Reinhardt argued that "federal recognition is tantamount to acknowledgment by the federal government

of tribal entitlement to treaty rights," *id.* at 980-81, and therefore concluded:

> As a practical matter, if the BIA reconsiders its earlier decision, granting federal recognition to the Samish, the agency's determination that the Samish have "maintained tribal political influence or other authority," 25 C.F.R. § 83.7(c), will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights.

Id. at 982. To this, the majority opinion replied:

> The dissent speculates that if the BIA reverses its decision and recognizes the Samish as an official tribe, this "will undoubtedly carry great weight in any judicial reconsideration of Samish entitlement to treaty fishing rights." In fact, such a decision would have marginal influence at best. *The* Washington I *court need not accord any deference to an agency proceeding that has been expressly limited to matter other than rights under the 1855 treaty.*

Id. at 978 (emphasis added).

Our holding in *Greene I* that the district court "need not accord any deference" to the BIA's recognition of the Samish Tribe, *id.* at 978, was affirmed in *Greene II*. There, the Secretary of the Interior appealed the district court's decision that it was formally to adjudicate under the Administrative

Procedure Act whether the Samish should be recognized as a tribe. *Greene II*, 64 F.3d at 1268. The Tulalip Tribe appeared as *amicus curiae*, and argued that the Samish were collaterally estopped from litigating tribal recognition by virtue of *Washington II*. *Id.* at 1269. We disagreed, holding that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. Dissenting, Judge Wright argued from the same premise as does the majority opinion here:

> *Washington II* precludes a finding that the Samish Tribe has 'maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.' 25 C.F.R. § 83.7(c). *Washington II* involved the same factual inquiry into the historicity of the present Samish Tribe. Such an inquiry is a necessary condition both for treaty recognition and for statutory recognition under the current BIA regulations. We have here substantial overlap in evidence and argument, save for subsequently developed evidence; and the claims, although not identical, are closely related. *See* Restatement (Second) of Judgments, § 27 (1982).
>
> * * *
>
> The factual finding regarding the Samish Tribe's historicity in *Washington II* precludes what would be a near identical inquiry in this case.

Id. at 1276. The majority opinion in *Greene II* rejected this argument, noting that in *Greene I* "[w]e . . . squarely rejected

the Tulalip's position that federal recognition of the Samish would be inconsistent with *Washington I* and *Washington II*" and "agreed with the district court . . . that the question of federal recognition as a tribe 'did not implicate treaty claims.'" *Id.* at 1271.

Indeed, basic rules of judicial review, collateral estoppel and evidence dictate this result. The factual findings underlying the BIA's recognition of the Samish Tribe are adjudicative in nature and, thus, not entitled to *Chevron* deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Further, any proceeding in district court resulting from the Samish Tribe's successful Rule 60(b)(6) motion will not be the equivalent of an appeal of the BIA's underlying factual findings, and, thus, the district court does not owe those factual findings the sort of deference reviewing courts typically owe. Further, even independent of *Greene II*, the Tulalip Tribe and others not a party to the BIA proceedings and who did not control those parties to the proceedings, did not agree to be bound by the proceedings and were not represented in the proceedings, cannot be collaterally estopped from relitigating the BIA's underlying factual findings. *See* Restatement (Second) of Judgments §§ 27, 39-42 (1982). Finally, any testimony introduced during the BIA proceedings is hearsay as to treaty-rights litigation and should be barred upon objection by the Tulalip Tribe or others that did not themselves nor did their predecessors in interest have "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" during the BIA proceedings. Fed.R.Evid. 804.

Our precedent holds—and, for the reasons explained above, rightly so—that "[f]ederal recognition does not self-execute treaty rights claims," *Greene I*, 996 F.2d at 977, and "[e]ven if the federal government says that the Samish are an official Indian tribe, whether they may fish as a treaty tribe in common with [other tribes] is another question." *Id.* at 975. The majority opinion's "inevitable conclusion" to the contrary, Op. at 1158, overrules this prior circuit precedent.

III.

Until now, our precedent has been both clear and consistent that whether a group of Native Americans are recognized as a tribe by the federal government is a distinct legal inquiry from whether that same group of Native Americans qualify for off-reservation fishing rights pursuant to the Point Elliott and related treaties; and, equally so, that recognition as a tribe is *not* a necessary precondition for off-reservation fishing rights. Thus, the fact that the Samish Tribe was not recognized by the federal government at the time of *Washington II* in no way prevented it (as did the Stillaguamish and Upper Skagit Tribes) from putting forth the type of evidence of having maintained an organized tribal structure that could have resulted in a finding by the district court in *Washington II* that the Samish Tribe was entitled to off-reservation fishing rights pursuant to the Treaty of Point Elliott. Nor has the Samish Tribe adduced any evidence that it was precluded from so doing.

Further, as we have previously held, federal recognition does not compel status under the Point Elliott and related treaties, and, indeed, a district court "need not accord any

deference to an agency proceeding that has been expressly limited to matter other than rights under the 1855 treaty." *Greene I*, 996 F.2d at 978.

Accordingly, I would affirm the order of the district court.

APPENDIX B — ORDER DENYING THE SAMISH TRIBE'S MOTION FOR RECONSIDERATION FILED FEBRUARY 7, 2003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C70-9213

Subproceeding No. 01-2

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

and

SAMISH INDIAN NATION

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendants.

ORDER DENYING THE SAMISH TRIBE'S MOTION FOR RECONSIDERATION

Before the court is the Samish Indian Tribe's motion for reconsideration of the court's December 19, 2002 Order Denying the Tribe's Motion to Reopen. In that order, the court

found that two factors weighed against the Samish's request to reopen the judgment in *United States v. Washington* ("*Washington II*"): first, that the Samish's 1996 federal recognition was not an "extraordinary circumstance" for purposes of Rule 60(b)(6), and, second, that the interests in finality were substantial given the numerous fish allocation and management agreements that would be disrupted by the Samish's intervention. In the instant motion, the Samish ask the court to reconsider both conclusions.[1]

As to the first, the Samish contend that the court committed manifest error in ruling that the Tribe's recognition was not an "extraordinary circumstance" since, in the Tribe's paraphrase, "the Ninth Circuit clearly ruled that the Samish Tribe would be given a full and independent opportunity to litigate its treaty status if it obtained recognition." Mot. at 6. The Ninth Circuit never made such a ruling. In *Green v. United States*, 996 F.2d 973 (9th Cir. 1993), the Ninth Circuit concluded that the Tulalip Tribe could not intervene in the Samish's recognition proceeding because recognition did not implicate treaty rights. In response to the Tulalip Tribe's arguments, the Ninth Circuit acknowledged that the Samish, if recognized, might next seek to assert fishing rights, but the court concluded that, even so, the Tulalip's treaty interests were not "practically impaired" since recognition and treaty rights were unrelated. *Id.* at 978. The court never even suggested that the Samish would be entitled to reopen *Washington II* upon obtaining

1. Because the court is not persuaded that it committed manifest error in its order, it has not asked for responsive briefing from the other parties.

recognition. Any other construction of the Ninth Circuit's statements in *Greene* is untenable.[2]

The court's rulings regarding the effect of the Samish's recognition are not, or so it would appear, what truly prompted the instant motion. The primary focus of the Tribe's motion concerns whether the Tribe's intervention would in fact be unduly disruptive to the many management and allocation agreements in this case. The Samish assert that necessary information concerning such agreements was not forthcoming from other tribal parties, precluding the Samish from addressing the disruption concerns in settlement proposals. The Samish further state that at oral argument on the motion, counsel for the Tulalip Tribe revealed a "new fact" — namely, that all such agreements and orders are matters of public record. This statement, according to the Samish, contradicted previous representations by tribal counsel that the contents of such agreements were unavailable. Having now examined these agreements, the Samish submit a proposal that purports to "address all possible disruptions its participation in *U.S. v. Washington* might entail." Mot. at 3.

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2. It is worth mentioning, moreover, that none of the issues before the court on the Samish's motion to reopen — such as the requirements of Rule 60(b)(6) and the finality interests — were before the Ninth Circuit in *Greene*. Therefore, whatever remarks the Ninth Circuit made about the prospect of the Samish returning to this forum should be construed warily. This is especially true in light of the Ninth Circuit's statement that Samish recognition "would have marginal influence at best" on the Tribe's entitlement to fishing rights. *Greene*, 996 F.2d at 978.

Appendix B

Notwithstanding the Samish's efforts to craft a workable, minimally disruptive framework for the Tribe's intervention, the court is unpersuaded that the interests in finality can or should be overcome in this case. Under any scenario, the Samish, in addition to the other newly recognized Tribes likely to seek intervention, would necessarily inject themselves into sensitive agreements and upset current treaty tribes' allocations. The Samish assert, however, that they are "initially" interested only in "ceremonial and subsistence treaty fishing rights" and that such an exercise of fishing rights would not "cause financial impacts to other tribes." Mot. at 4. But the Samish themselves admit they will likely want to engage in commercial fishing one day and that intra-tribal allocation disputes requiring court intervention might therefore arise. Mot. at 4-5. The court remains of the opinion that finality is an overriding concern in this case.

Such finality concerns, however, were not the sole or even the chief basis for denying the Tribe's motion to reopen. The court recognizes the effort the Samish have made to draft a practicable framework for intervention, but such efforts are futile unless the Tribe can demonstrate that, under Rule 60(b), it should be allowed to reopen the judgment. To focus on mitigating the effects of reopening a judgment, rather than on whether reopening a judgment is procedurally allowable, is to put the cart before the horse. In the earlier Order, the court noted the reasons that Rule 60(b)(6) could not be used to relieve the Samish of the final judgment in *Washington II*. Among those reasons is that, unlike in other instances in which Rule 60(b)(6) was successfully invoked, the Tribe has never challenged the fairness of the *Washington II* proceeding. During that proceeding, the Samish had a full

and fair opportunity to prove its entitlement to fishing rights and failed to do so. In its motion to reopen, the Tribe never argued that there was a fundamental defect in that earlier proceeding, which defect constitutes an "extraordinary circumstance."

The court need not reiterate all of the bases for denying the Tribe's motion to reopen. It is enough to note, however, that, even putting aside the finality concerns that the Samish seek to allay in the instant motion, there are ample reasons to deny the Tribe another chance at litigating its treaty status. No less than three courts have decided the issue against the Samish. Rule 60(b) was not designed to allow parties numerous bites at the same apple absent certain extraordinary circumstances not present in this case.

CONCLUSION

For the foregoing reasons, the motion for reconsideration [docket no. 69-1] is hearby DENIED.

DATED at Seattle, Washington this 7th day of February, 2003.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER DENYING THE SAMISH TRIBE'S MOTION TO REOPEN JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE ENTERED AND FILED DECEMBER 19, 2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C70-9213

Subproceeding No. 01-2

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

and

SAMISH INDIAN NATION

Plaintiff-Intervenor,

v.

STATE OF WASHINGTON, et al.,

Defendants.

Appendix C

ORDER DENYING THE SAMISH TRIBE'S MOTION TO REOPEN JUDGMENT

THIS MATTER comes before the court on the Samish Indian Tribe's (hereinafter "Samish" or "Tribe") motion, filed pursuant to Rule 60(b) (6), to reopen the judgment in *United States v. Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd* 641 F.2d 1368 (9th Cir. 1981). In this motion, the Tribe argues that its 1996 federal recognition from the Department of Interior is an "extraordinary circumstance" that warrants reexamination of its treaty fishing rights under the Treaty of Point Elliott, which rights were previously denied the Tribe. Nine of the 22 treaty tribes (referred to herein as the "Opposition Tribes"), fearing dilution of their fish harvest and disruption of long-standing allocation and management agreements, oppose the Samish's motion, as does, by separate pleading, the United States.[1] The Opposition Tribes and the United States believe both that there are procedural bars to the Samish's motion and that the Tribe's federal recognition is not an "extraordinary circumstance" that justifies reopening this case.

Having reviewed the documents filed in support of and in opposition to this motion, and considered the parties' oral arguments, the court finds and rules as follows:

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1. The State of Washington has filed a brief statement of non-opposition to the Samish's motion.

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I. BACKGROUND

A. *Treaty Fishing Rights*

In 1970, the United States, on its own behalf and as trustee for seven Indian tribes, brought suit seeking an injunction requiring the State to protect those tribes' share of runs of anadromous fish. Seven other tribes intervened as plaintiffs. In 1974, United States District Judge Boldt ruled that all fourteen tribes had treaty fishing rights under several Indian treaties, including the Treaty of Point Elliott, which entitled them to take up to fifty percent of the harvestable fish passing through their off-reservation fishing grounds. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Washington I*"). *Washington I* declared the treaty fishing rights of only those "14 Indian entities" that had participated as plaintiffs in that proceeding and that were defined as "Treaty Tribes" in the ruling.[2] 384 F. Supp. at 405. *Washington I* contemplated that additional Indian entities might become parties in the case if any such entities demonstrated that it was "entitled to exercise fishing rights under the treaties construed herein within the Western District of Washington." *Id.*

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2. On appeal, the State challenged Judge Boldt's confirmation of Treaty rights for the then-unrecognized Stillaguamish and Upper Skagit, Sauk-Suiattle tribes, which thereafter attained federal recognition between Judge Boldt's decision and the appeal. The Ninth Circuit affirmed Judge Boldt's conclusion that these tribes were entities possessing treaty rights, holding that "[n]onrecognition of the tribe by the federal government . . . can have no impact on vested treaty rights." *United States v. Washington*, 520 F.2d 676, 692 (9th Cir. 1975).

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On September 20, 1974, shortly after Judge Boldt's initial decision, the Samish Tribe, as well as the Duwamish, Snohomish, Steilacoom, and Snoqualmie Tribes, moved to intervene in *United States v. Washington,* to assert their own treating fishing rights. Judge Boldt referred the issue of the Samish's treaty status to Magistrate Judge Robert Cooper sitting as a Special Master. After a five-day trial, Magistrate Judge Cooper deter-mined that the Samish was neither a treaty tribe nor a political successor to the signatory treaty tribe.

The Samish appealed this determination to Judge Boldt, who thereafter conducted a *de novo* evidentiary hearing. The Samish submitted additional evidence to Judge Boldt, who heard argument in January 1977. Judge Boldt issued his decision in March 1979, ruling that the Samish were not a Treaty Tribe as defined in *Washington I* and that its members were not entitled to exercise treaty rights under the Treaty of Point Elliott. *United States v. Washington,* 476 F. Supp. 1101, 1111 (W.D. Wash. 1979) ("*Washington II*"). Judge Boldt found that the Samish Tribe was not a successor in interest to any treaty signatory and had not maintained an organized tribal structure. *Id,* at 1106. Judge Boldt also concluded that the Samish were not entitled to exercise treaty rights because the Tribe was not "federally recognized" by the United States Department of Interior (DOI). *Id.* at 1111.

The Samish appealed Judge Boldt's ruling to the Ninth Circuit, arguing *inter alia* that Judge Boldt improperly adopted without substantial change the proposed findings and conclusions submitted by the United States. *United States v. Washington,* 641 F.2d 1368, 1371 (9th Cir. 1981). The

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Samish also appealed Judge Boldt's Finding of Fact No. 27, in which Judge Boldt found that the Samish had "not lived as a continuous separate, distinct and cohesive Indian cultural or political community." 476 F. Supp. at 1105. Because Judge Boldt had in fact adopted most of the United States' proposed findings of fact and conclusions of law, the Ninth Circuit applied close scrutiny to the Samish's claims. The Ninth Circuit concluded that Judge Boldt had applied an incorrect legal test in determining whether a tribe had treaty rights. Rejecting the notion that federal recognition or nonrecognition was dispositive, the Ninth Circuit instead stated that the "single necessary and sufficient condition for the exercise of treaty rights is" whether a "group of Indian descendants . . . have maintained an organized tribal structure." 641 F.2d at 1372.

Applying this test to the record, the Ninth Circuit concluded "[a]fter close scrutiny, . . . that the evidence supported [Judge Boldt's] finding of fact" that the Samish had not functioned since treaty times as "continuous separate, distinct and cohesive Indian cultural or political communit[ies]." *Id.* at 1373. As for the effect of the Samish's nonrecognition, the court stated that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." *Id.* The court, therefore, affirmed Judge Boldt because "the district court correctly resolved this question despite its failure to apply the proper standard." *Id.* at 1374. The Samish appealed this decision to the United States Supreme Court, which denied certiorari. 454 U.S. 1143 (1982).

By the early 1980s, therefore, the Samish Tribe had failed to persuade at least three judicial bodies — Magistrate Judge Cooper, Judge Boldt, and the Ninth Circuit — that it was entitled to be a party to this case.

B. *Federal Recognition Proceeding*

In 1972, after Congress began conditioning eligibility for most programs benefitting Indians upon status as a federally recognized tribe, the Samish first sought federal recognition. *See* 25 U.S.C. §§ 450-450n. In 1978 the DOI published final regulations governing the procedure for official recognition of Indian Tribes. Apparently, the DOI took no action on the Samish's original petition until after the 1978 regulations were promulgated, and the Samish filed a revised petition under the new regulations in October 1979. Thereafter, the Bureau of Indian Affairs (BIA) conducted an independent inquiry into the Samish's recognition petition. The recognition petition was denied first in 1982, when the Assistant Secretary for Indian Affairs first published a preliminary determination concluding that the Samish should not be recognized. Samish objected to this decision and submitted a response and additional information and, after several years of delay, the Deputy to the Assistant Secretary for Indian Affairs issued a final decision in 1987 denying federal recognition to the Samish. 52 Fed. Reg. 3709 (Feb. 5, 1987).

In 1989, the Samish filed a federal action in this district, alleging that the BIA's denial of its recognition petition violated the Tribe's due process rights and that the Samish was the successor in interest to the treaty Samish Tribe for

purposes of showing entitlement to federal recognition. *Greene v. Lujan*, No. 89-645Z (W.D. Wash.).[3] The Tulalip Tribe sought to intervene in this case, believing that if Samish were to gain federal recognition, then treaty fishing rights would likely follow. Judge Zilly denied Tulalip's intervenor application but permitted it to participate as *amicus curiae*. On an interlocutory appeal, the Ninth Circuit affirmed the denial of the Tulalip's intervenor application on the grounds that "the calculus for tribal treaty rights under Ninth Circuit law is separate and distinct from that for federal acknowledgment." *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993). Thus, the Ninth Circuit reasoned, Tulalip's interest in the recognition proceeding did not rise to intervenor status since "[e]ven if [the Samish] obtain federal tribal status, [they] would still have to confront the decisions in Washington I and II before they could claim fishing rights." *Id*.

On the merits, Judge Zilly held that the Samish had been denied due process in the recognition proceedings and vacated the decision denying recognition and remanded the recognition petition to the DOI for formal adjudication under the Administrate Procedure Act (APA). February 25, 1992 Order, 1992 WL 533059. The Ninth Circuit affirmed Judge Zilly's due process ruling, requiring an APA due process hearing for the Samish. *Greene v. Babbitt*,, 64 F.3d 1266 (9th Cir. 1995).

On remand, Administrative Law Judge (ALJ) David Torbett of the DOI Office of Hearings and Appeals conducted

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3. Bruce Babbitt was later substituted for Manuel Lujan as Secretary of the Interior.

an APA due process hearing on the Samish's recognition proceeding. After an eight-day hearing, on August 31, 1995 Judge Torbett issued recommended findings of fact and conclusions of law in favor of Samish recognition.

In his recommended decision, ALJ Torbett found that the Samish met all seven mandatory criteria necessary for federal recognition as an Indian tribe. *See* 25 C.F.R. § 83.7 (1993). Reviewing ALJ Torbett's decision, the Assistant Secretary for Indian Affairs rejected some of his findings and conclusions, but ultimately ruled in favor of Samish recognition on November 8, 1995. The Samish appealed these rejections, and Judge Zilly reinstated the finding of fact and conclusions of law that had been rejected and affirmed the Samish recognition decision. *Green v. Babbitt*, 943 F. Supp. 1278, 1288-89 (W.D. Wash. 1995).

Now, having achieved federal recognition, the Samish set out again,[4] pursuant to Rule 60(b) (6), to reopen the judgment in this case.

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4. An earlier, unrelated attempt to set aside the judgment in *Washington II* occurred on November 22, 1993, when three Tribes, including the Samish, moved for relief under Rule 60(b)(6) on the grounds that Judge Boldt might have been mentally incompetent at the time he signed the final findings in the case. This court, on January 23, 1995, denied the motion on three grounds: (1) that courts should avoid the finality of judgments; (2) that a ruling for the Tribes would open the floodgates to future challenges to judgments on grounds of judicial incompetence; and (3) the Tribes suffered no manifest injustice since the magistrate judge and the Ninth Circuit reached the same conclusion as Judge Boldt. The Ninth Circuit affirmed this court's ruling. *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996).

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II. DISCUSSION

A. *Rule 60(b)(6) Standards*

Federal Rule of Civil Procedure 60(b) permits a court to relieve a party from an otherwise final judgment. Rule 60(b) states in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons. . . ." The Rule then identifies five specific provisions, for such things as mistake, discovery new evidence, fraud, etc., that could be grounds for relief under the Rule. Subsection (b)(6) acts as a "catch-all" provision, stating that a court may grant relief from a judgment if there is "any other reason justifying relief from the operation of the judgment." This provision applies only when there are reasons for relief other than those set out in the more specific clauses of Rule 60(b). *See Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 & n.11 (1988).

Rule 60(b)(6) "does not particularize the authority adequate to enable [courts] to vacate judgments whenever such action is appropriate to accomplish justice, [but it should] only be applied in extraordinary circumstances." *United States v. Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996) (internal citations and quotations omitted). The Ninth Circuit has cautioned that the Rule should be used "sparingly as an equitable remedy to prevent manifest injustice" and only "where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Id.*

Rule 60(b) is designed to allow courts to reconsider both factual findings and legal conclusions under the limited circumstances permitted by the Rule. Thus, even though the issue of the Tribe's treaty status has been previously litigated, this court is not barred from reconsidering *Washington II* were it to find the existence of circumstances under the Rule that warrant it.[5]

B. ***Motion to Reopen***

While numerous issues are raised in this matter, the court is of the opinion that there are two principal issues:

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5. The court is mindful of the fact that Judge Zilly, in the recognition litigation, ruled that the Samish were precluded by *Washington II* from litigating its treaty tribe status. *See,* Order, 1992 WL 533059 at 2. While Judge Zilly could not, in unrelated litigation, properly reconsider the findings and conclusions in *Washington II,* this court is not barred from such reconsideration if there are "extraordinary circumstances" within the meaning of Rule 60(b) that justify it. To hold otherwise would preclude Rule 60(b) motions, since the non-moving party could always plead *res judicata.*

A related issue, raised by the United States, is whether this court can properly consider the Samish's motion in light of the Ninth Circuit's decision affirming *Washington II.* This issue is easily resolved. In *Standard Oil Co. of Cal. v. United, States,* 429 U.S. 17 (1976), the Supreme Court stated that an appellate mandate "relates to the record and issues then before the court, and does not purport to deal with possible later events." *See also* 11 Wright, Miller & Kane, Federal Practice & Procedure § 2873 (1995) ("An appellate court may not know whether the requirements for reopening a case under the rule are met until there has been a full record developed. Such a record can only be made in the trial court.").

(1) whether the Samish's federal recognition is an "extraordinary circumstance" that justifies reopening the judgment in *Washington II*; and (2) whether the interests in finality are paramount to other interests. Each is discussed below.

1. *"Extraordinary Circumstances"*

The primary inquiry on any motion under Rule 60(b)(6) is whether there are "extraordinary circumstances" that warrant vacating the judgment. *United States v. Washington*, 98 F.3d at 1163. Thus, the burden is on the Samish to show that their achievement of federal recognition constitutes an "extraordinary circumstance" in this context.

From the outset, the Samish face a significant burden because it has been well established that federal recognition does not necessarily restore Samish treaty rights. *See Washington I*, 520 F.2d at 692 ("Nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact vested treaty rights."). Indeed, the Ninth Circuit has been clear that it "regards the issues of tribal treaty status and federal acknowledgment as fundamentally different." *Greene*, 64 F.3d at 1270. The Ninth Circuit denied the Tulalip Tribe's attempt to intervene in the Samish recognition proceeding because it "disagreed with their position that Samish success [in the recognition proceeding] would undermine the finality of the *Washington II* decision." *Id.* at 1271. Put even more sharply, the Ninth Circuit has stated that "[f]ederal recognition is not a threshold condition a tribe must establish to [exercise treaty rights]" and that the Samish's recognition would have a "marginal

influence at best" on the determination of whether the Tribe may exercise treaty rights. *Greene*, 996 F.2d at 976, 978. Thus, the Samish's position that federal recognition is an "extraordinary circumstance" in this case is seemingly at odds with the Ninth Circuit's pronouncements to the contrary.

Indeed, the kind of "extraordinary circumstances" usually alleged in Rule 60(b)(6) motions are not present here. That is, the Samish have not alleged that the *Washington II*, proceeding was in any way inadequate or defective, precluding the Samish from adducing all evidence to support its claim to treaty fishing rights. The absence of such allegations is significant. The Samish have not identified, nor has the court's research revealed, an instance in which Rule 60(b)(6) was successfully invoked where there was no allegation or finding that the underlying proceeding had fundamental flaws. *Cf., e.g., Liljeberg*, 486 U.S. at 863 (setting aside the judgment because the trial judge had a conflict of interest and failed to recuse himself); *Klapprott v. United States*, 335 U.S. 601 (1949) (setting aside denaturalization judgment because at the movant was unable to defend himself in the proceeding due to imprisonment); *Ervin v. Wilkinson*, 701 F.2d 59, 61-62 (7th Cir. 1983) ("Where the moving party has been prevented from presenting the merits of his case by the conduct of which he complains, Rule 60(b) relief is most appropriate.").

The Samish argue, nonetheless, that the "nature and quality of [its] recognition" is the kind of circumstance that could warrant reexamining *Washington II* and that the evidence submitted during the recognition proceeding was "substantially different" — broader and more detailed — than

the evidence it submitted in *Washington II*.[6] Samish contend that a "more detailed historical picture" emerged in the recognition proceeding and that, by meeting the standard for recognition, it also met the standard for exercise of treaty fishing rights under *Washington I*.[7]

None of these arguments is persuasive. Whatever the "nature and quality" of the Samish's recognition, the fact remains that, as discussed *supra*, a tribe's recognition, or nonrecognition, has no impact on whether it may exercise treaty rights. The standard for treaty rights and for tribal

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6. The Samish also contend, relying on a phrase in a Finding of Fact in *Washington II*, that that decision was not intended to be the final word on its treaty status. *See Washington II*, 476 F. Supp. at 1111 ("[T]he Samish . . . [are not] *at this time* a treaty tribe in the political sense within the meaning of [*Washington I*]") (emphasis added). The Samish believe that the phrase "at this time" suggests that, should the Tribe later achieve the requisite continuity and organization of treaty tribes, the court might reconsider its treaty status. This argument merits only a brief response. First, the phrase "at this time," at the very least, admits of another interpretation — namely, that, while the Tribe might have at one time exhibited the attributes of a treaty tribe, it no longer did so. Second, the standard for exercise of treaty rights includes, *inter alia*, that a tribe "have *maintained* an organized tribal structure," which suggests that a break in that necessary structure forecloses a tribe's ability to meet the standard.

7. The Samish point out that they could not use the Treaty of Point Elliott in the recognition proceeding. That they nonetheless achieved recognition, the Samish contend, is a testament to the strength of the evidence, as treaties are the primary way of showing recognition.

recognition, while similar, are not identical, with "each determination serv[ing] a different legal purpose and ha[ving] an independent legal effect." *Greene*, 996 F.2d at 976. To gain federal recognition, the Samish had to establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe.[8] *See* 25 C.F.R. §§ 83-1 thru 83.7(c). To assert fishing rights, the Samish must demonstrate that they descended from a treaty signatory and "have maintained an organized tribal structure." *Washington II*, 641 F.2d at 1372. Three different judicial bodies in *Washington II* considered the evidence the Samish submitted in that proceeding and concluded that the Tribe had not "clearly established the continuous informal cultural influence [that is] required." *Washington II*, 641 F.2d at 1373. Thus, the Samish cannot rightly argue that having met the recognition standard, it has, *a fortiori*, met the standard for asserting treaty rights.

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8. In announcing Samish federal recognition in 1996, the federal government found that the Samish met this standard:

> We find that the Samish Tribal Organization has been continuously identified through history as Indian or aboriginal, has existed as a distinct community since first sustained European contact, has maintained political influence within itself as an autonomous entity and that 80 percent of its members are descendants of the historical Samish tribe or families which became incorporated into that tribe. We conclude, therefore, that the Samish Tribal Organization has met the mandatory criteria for acknowledgment. . . .

Samish Acknowledgment Decision, Ex. 8, 61 Fed. Reg. 15826.

Furthermore, the Samish are precluded from arguing, as they appear to, that the evidence it submitted in the recognition proceeding should persuade this court that *Washington II* was wrongly decided. If, as the Samish assert, the evidence it submitted in the recognition proceeding was different and more comprehensive, creating a more "detailed historical picture," such a fact does not entitle the Tribe to relief under Rule 60(b). First, such a claim would be properly brought pursuant to Rule 60(b)(2), which requires that motions based on newly-discovered evidence be filed within one year of the judgment. Furthermore, in addition to the timeliness problem, it is not clear that the different evidence touted by the Samish was, in fact, "newly discovered" or that it could not have been produced during the *Washington II* proceeding. *Cf. Frederick S. Wyle P.C. v. Texaco Inc.*, 764 F.2d 604, 609 (9th Cir. 1985) (stating that "movant is obliged to show not only that this evidence was newly discovered . . . but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing") (internal quotations omitted). There must be an end to litigation, and for that reason Rule 60(b) does not provide parties another chance at relitigating matters based on evidence gathered several years after a final judgment.

The court is mindful that the Samish's recognition decision was excessively delayed and that, had the Samish been recognized at the time it sought to intervene in *Washington II*, the outcome might have been different.[9] Such

9. Judge Zilly noted that the "Samish people's quest for federal recognition as an Indian tribe has a protracted and tortured history. (Cont'd)

speculation, however, cannot be grounds for granting relief under Rule 60(b).[10] In any event, other Washington tribes, including the Stillaguamish and the Upper Skagit, exercise treaty fishing rights even though not federally recognized. *Washington I*, 520 F.2d at 692-93. Furthermore, while the Samish's non-recognition was dispositive to Judge Boldt in *Washington II*, the Ninth Circuit, after conducting its own review employing the proper standard, concluded that the Samish had not met the standard for exercising treaty rights.

In conclusion, the court finds for the foregoing reasons that the Samish's 1996 recognition is not an "extraordinary

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(Cont'd)

and their long journey for recognition has been made more difficult by excessive delays and governmental misconduct." *Greene*, 943 F. Supp. at 1281.

10. Nor can the Tribe rely on the fact that the United States has in the past qualified its opposition to Samish intervention on the grounds that future federal recognition might justify reconsideration. The Samish stress that their potential future recognition was stressed at all stages of *Washington II* because, they argue, it was relevant in allowing the court to deny treaty status at that time. The United States cannot dispute its previous statements regarding the potential effect of Samish recognition, but it asserts only that it agreed to consider whether recognition might justify reconsideration. Whether the United States agreed to reconsider its opposition to the Samish's treaty tribe status upon federal recognition is of little moment. Samish place great weight on these statements, but there are no comparable statements *from the court* in *Washington II* that recognition might justify reconsideration. To the contrary, the Ninth Circuit in *Washington II* specifically stated that "[n]onrecognition of the tribe . . . [has] no impact on vested treaty rights." *See Washington I*, 520 F.2d at 692.

circumstance" that justifies reopening the judgment in *Washington I.*

2. *Finality concerns*

An equally compelling factor weighs against reopening the judgment in this case: the interest in finality.

The United States and the Opposition Tribes point out that, in reliance on *Washington II,* this court has approved many state-tribal fish management plans, mediated and decided intertribal disputes on treaty fishing issues, determined treaty tribes' usual and accustomed fishing places, and decided allocation issues. *See. e.g., United States v. Washington,* 626 F. Supp. 1405 (W.D. Wash. 1985) (collecting court's finding and orders including, *inter alia,* 1985 Puget Sound Salmon Management Plan and agreements between the Tulalip Tribe and other Tribe). The United States and Opposition Tribes rightly observe that management of fish harvest involves a delicate balancing of interests within the overall framework and that these management plans — achieved after considerable time and expense — would be upset by the addition of another Tribe at this late stage.

The Samish, however, do not believe that granting the instant motion will "upset the fabric" of *United States v. Washington,* arguing that state tribal fish management plans and allocation decisions will suffer minimal disruption should the Samish ultimately be granted treaty status. The Samish's accommodating intentions notwithstanding, the background of this case shows that this assertion rings false. The parties have worked diligently and extensively over th

many years this case has been active to establish management frameworks that accommodate the fiercely competing needs of the various tribes and of the State. The issues have been complicated by the increasing scarcity of fish stocks and the need to preserve and conserve certain fish species. This case over a 28-year period has proven to be a battleground where many of these issues have been fought and solutions hammered out. The Samish have not convincingly rebutted, nor could they, the unmistakable conclusion that, at this stage, their addition would wreak havoc on hard-wrought management agreements and plans.[11]

The Supreme Court has recognized that the interests of finality, as embodied in the policies of *stare decisis* and *res judicata*, are at their zenith in cases, such as this one, which involve natural resource allocation. *See, Nevada v. United States*, 463 U.S. 110 (1983) (rejecting attempt to reopen a water rights decree to accommodate new claims to water); *Arizona v. California*, 460 U.S. 605, 620 (1983) (noting that major purpose of the case was "to provide the necessary assurance to states of the Southwest . . . of the amount of water they can anticipate to receive from the Colorado River system" and that "[r]ecalculating the amount of practicably irrigable acreable runs directly counter to strong interest in

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11. At oral argument, counsel for the United States pointed out that, in addition to the Samish, two of the other five Tribes that sought intervention in *Washington II* have attained federal recognition since that decision. Therefore, if the court were to grant the Samish intervention in *United States v. Washington*, it is likely that at least two other tribes would also move to reopen the judgment in *Washington II*, thereby potentially injecting further complications into the long-negotiated management plans in this case.

finality in this case"). Just as states in the West rely on the finality of water-rights agreements, so too do the 22 treaty tribes in this case, as well as the State of Washington, rely on the finality of fish-allocation and countless other agreements that have been entered in this case. In reliance on the finality of such agreements, the treaty tribes have invested significant time and capital to secure their take of what, for some, might be their only natural resource. Changes in allocation agreements (on which some tribes have relied for years) could have serious repercussions for already financially hard-pressed Tribes.

III. CONCLUSION

While the court recognizes that the Samish Tribe's quest for treaty fishing rights, beginning in the mid-1970s and concluding here, has taken them down a long and difficult path, and appreciates the commitment and perseverance demonstrated in this pursuit, there have been 28 years of post-*Washington I* litigation in this case, all under the assumption that *Washington II* was binding and conclusive. Reexamining the Samish intervention issue could require changing scores of orders and management plans in this case, thereby affecting the rights of 22 other treaty tribes as well as the United States and the State of Washington. Finality and certainty require that long-resolved issues in this case remain undisturbed.[12]

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12. Having found that the Samish's recognition does not constitute an "extraordinary circumstance" and that finality concerns outweigh other considerations, the court need not consider the remaining issues, including whether the Samish's motion was filed

(Cont'd)

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Now, therefore, the motion [docket no. 39-1] is hereby DENIED.

DATED at Seattle, Washington this 19th day of December, 2002.

s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

(Cont'd)
within a reasonable period. Another issue of no import is the Samish's motion to strike, in which motion the Samish argue that the Opposition Tribe's brief was filed three days late. Assuming that the brief was filed late, the Samish have suffered no prejudice, having filed its reply brief, as provided by the agreed briefing schedule, thirty days after receipt of the Joint Opposition brief.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING FILED JUNE 6, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-35145

DC No. CV 70-9213 BJR
WD Wash.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

STATE OF WASHINGTON; SWINOMISH TRIBAL COMMUNITY; NISQUALLY INDIAN TRIBE; PORT GAMBLE S'KLALLAM TRIBE; LOWER ELWHA BAND OF KLALLAMS; JAMESTOWN S'KLALLAM TRIBE; SKOKOMISH INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE OF WASHINGTON STATE; UPPER SKAGIT TRIBE, Upper Skagit Indian Tribe; LUMMI NATION,

Defendants - Appellees.

SAMISH INDIAN TRIBE,

Defendant - Appellant.

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ORDER

Before: TASHIMA, PAEZ, and BEA, Circuit Judges.

The panel has voted to deny the petitions for panel rehearing, with Judge Bea voting to grant panel rehearing. Judge Paez votes to deny the petitions for rehearing en banc and Judge Tashima so recommends. Judge Bea votes to grant the petitions for rehearing en banc. The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petitions for panel rehearing and the petitions for rehearing en banc of the United States, the Seven Tribes, and the Lummi Nation and Swinomish Indian Tribal Community are denied.

APPENDIX E — COURT DECISIONS AND RELATED CASES

A. REPORTED DISTRICT COURT DECISIONS:

1. *United States v. State of Washington*, 384 F. Supp. 312 (W.D. Wa. 1974)

2. *United States v. State of Washington*, 66 F.R.D. 477 (W.D. Wa. 1974)

3. *United States v. State of Washington*, 459 F. Supp. 1020 (W.D. Wa. 1978) (compilation of major post-trial substantive orders from 9/12/74 through 6/30/78)

4. *United States v. State of Washington*, 476 F. Supp. 1101 (W.D. Wa. 1979)

5. *United States v. State of Washington*, 506 F. Supp. 187 (W.D. Wa. 1980)

6. *United States v. State of Washington*, 626 F. Supp. 1405 (W.D. Wa. 1985) (compilation of major post-trial substantive orders from 7/78 through 12/31/78)

7. *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wa. 1994)

8. *United States v. State of Washington*, 898 F. Supp. 1453 (W.D. Wa. 1995), *amended by* 909 F. Supp. 787 (W.D. Wa. 1995)

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B. NINTH CIRCUIT DECISIONS:

1. ***United States v. State of Washington***, 520 F.2d 676 (9th Cir. 1975)

2. ***United States v. State of Washington***, 573 F.2d 1117 (9th Cir. 1978)

3. ***United States v. State of Washington Dept. of Fisheries***, 573 F.2d 1118 (9th Cir. 1978)

4. ***United States v. State of Washington***, 573 F.2d 1121 (9th Cir. 1978)

5. ***Puget Sound Gillnetter's Association v. U.S. District Court for Western Dist. of Washington***, 573 F.2d 1123 (9th Cir. 1978)

6. ***Puget Sound Gillnetter's Association v. U.S. District Court for Western Dist. of Washington***, 605 F.2d 492 (9th Cir. 1979)

7. ***United States v. Baker***, 641 F.2d 1311 (9th Cir. 1981)

8. ***United States v. State of Washington***, 641 F.2d 1368 (9th Cir. 1981)

9. ***United States v. Lower Elwha Tribe***, 642 F.2d 1141 (9th Cir. 1981)

10. ***United States v. State of Washington***, 645 F.2d 749 (9th Cir. 1981)

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11. ***United States v. State of Washington***, 694 F.2d 188 (9th Cir. 1982)

12. ***United States v. State of Washington***, 694 F.2d 1374 (9th Cir. 1982), *rehearing granted, opinion withdrawn and replaced by* 759 F.2d 1353 (9th Cir. 1985)

13. ***United States v. State of Washington***, 730 F.2d 1314 (9th Cir. 1984)

14. ***United States v. State of Washington***, 759 F.2d 1353 (9th Cir. 1985)

15. ***United States v. State of Washington***, 761 F.2d 1404 (9th Cir. 1985)

16. ***United States v. State of Washington***, 761 F.2d 1419 (9th Cir. 1985)

17. ***United States v. Skokomish Indian Tribe***, 764 F.2d 670 (9th Cir. 1985)

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25. ***Greene v. Babbitt***, 64 F.3d 1266 (9th Cir. 1995)

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28. ***United States v. State of Washington***, 98 F.3d 1159 (9th Cir. 1996)

29. ***United States v. State of Washington***, 135 F.3d 618 (1998), *rehearing granted, opinion withdrawn and replaced by* 157 F.3d 630 (9th Cir. 1998)

30. ***Muckleshoot Indian Tribe v. Lummi Indian Tribe***, 141 F.3d 1355 (9th Cir. 1998)

31. ***Washington v. Daley***, 173 F.3d 1158 (9th Cir. 1999)

32. ***United States v. Muckleshoot Indian Tribe***, 235 F.3d 429 (9th Cir. 2000)

33. ***United States v. State of Washington***, 235 F.3d 438 (9th Cir. 2000)

34. ***Muckleshoot Indian Tribe v. Lummi Indian Tribe***, 235 F.3d 443 (9th Cir. 2000)

35. ***Midwater Trawlers Cooperative v. Dept. of Commerce***, 282 F.3d 710 (9th Cir. 2002)

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C. RELATED CASES:

1. Pacific Salmon Treaty Cases:

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2. Miscellaneous

Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D.Wa. 1998) (enjoining construction of marina in Muckleshoot Tribe's usual & accustomed fishing areas)

Northwest Sea Farms v. U.S. Army Corps of Engineers, 915 F.Supp. 1515 (W.D. WA 1996) (affirming denial of Corps permit to construct net pens for salmon farming that would block Lummi Nation's fishing grounds)

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No. 05-445

In the Supreme Court of the United States

LUMMI NATION, ET AL., PETITIONERS

v.

SAMISH INDIAN TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

WILLIAM B. LAZARUS
ELIZABETH ANN PETERSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether federal recognition of the Samish Tribe was an extraordinary circumstance pursuant to Federal Rule of Civil Procedure 60(b)(6) warranting reopening of a 20-year-old judgment holding that the Samish Tribe was not the successor in interest to a signatory of the Treaty of Point Elliot.

2. Whether the court of appeals' determination that federal recognition of the Samish Tribe warrants reopening of the previous judgment had the effect of denying due process to the Tribes whose treaty rights would be adversely affected by a reversal of the prior determination that the Samish Tribe is not the successor to a treaty Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 394 F.3d 1152. The order of the district court (Pet. App. 47a-66a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2005. A petition for rehearing was denied on June 6, 2005 (Pet. App. 67a-68a). On August 17, 2005, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including October 3, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Samish Tribe is a group that believes itself to be a successor in interest to one of the Tribes with which the United States negotiated the Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927. That treaty is one of several treaties negotiated with the Indians of the Pacific Northwest by Washington territorial governor Isaac Stevens (Stevens Treaties). In the Stevens Treaties, the United States secured the cession of the majority of the Indians' vast territory by agreeing that the signatory Tribes would reserve, in addition to portions of their territory, their right to fish outside their reserved lands. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel*, 443 U.S. 658, 661-662, 666-667 (1979). The 1974 judgment in *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976) (*Washington I*), allocates fishing rights among successor Tribes to the signatories of the Stevens Treaties who were then residing in what is now the State of Washington.

2. Following the judgment in *Washington I*, the Samish and various other Indian groups sought unsuccessfully to intervene in the litigation. The district court denied intervention on the ground that only federally recognized Tribes could exercise treaty fishing rights. See *United States* v. *Washington*, 476 F. Supp. 1101 (W.D. Wash. 1979), aff'd, 641 F.2d 1368, 1371 (9th Cir. 1981), cert. denied, 454 U.S. 1143 (1982) (*Washington II*). The Samish Tribe was not federally recognized at that time.

The court of appeals affirmed the denial of Samish's motion to intervene, although it rejected the district

court's reasoning. The court of appeals reasoned that "[n]onrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." 641 F.2d at 1371 (internal quotation marks omitted). The court nonetheless upheld the denial of intervention based on its own "close scrutiny" of the facts, which led the court to conclude that the Samish and other applicants in intervention had failed to provide evidence sufficient to establish that they were successors to Tribes entitled to rights under the Treaty. *Id.* at 1373.

3. Before 1978, the Department of the Interior (Interior) maintained government-to-government relationships with federally recognized Tribes on an essentially *ad hoc* basis, and the members of such Tribes were granted benefits under various statutes and programs. In 1978, Interior established a uniform process for acknowledging Tribes that previously had not been recognized and issued final regulations establishing that process. See 43 Fed. Reg. 39,361 (1978).

Acknowledgment is granted to Indian groups that can establish that they have maintained a "substantially continuous tribal existence and * * * have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3(a). Groups apply for acknowledgment by filing a petition that addresses seven mandatory criteria set forth in the regulations, one of which is proof that the petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 and that a predominant portion of the petitioning group has comprised a distinct community from historical times until the present. 25 C.F.R. 83.7. Once Interior determines that a petitioner is entitled to acknowledgment as an Indian Tribe, the Tribe becomes

eligible to apply for certain programs, services, and benefits that are available only to federally recognized Indian Tribes. 25 C.F.R. 83.12; see 25 C.F.R. 83.2 ("Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes.").

4. In 1972, a group identified as the Samish Indian Tribe of Washington applied for federal acknowledgment. *Greene* v. *Babbitt*, 64 F.3d 1266, 1269 (9th Cir. 1995). In 1979, after Interior adopted the regulations governing its acknowledgment process, Samish filed a revised petition. The Secretary denied the petition on February 5, 1987. *Ibid.* Samish sought judicial review of the denial, claiming that Interior had violated its due process rights by failing to hold a formal hearing on its petition. Samish also renewed its effort to obtain judicial recognition of its claimed status as the successor to a Treaty signatory.

a. The district court ruled that Samish was barred from relitigating the question of its claimed treaty successorship because of the *res judicata* and collateral estoppel effects of *Washington II*. See *Greene* v. *United States*, 996 F.2d 973, 975 (9th Cir. 1993) (*Greene I*). In a separate ruling, the district court denied a petition by the Tulalip Tribe for intervention in the Samish acknowledgment proceeding, in which Tulalip argued that its interest in protecting the treaty rights it had secured in *Washington I* and *II* could be adversely affected by federal acknowledgment of Samish. Intervention was denied on the ground that Tulalip lacked the requisite interest in the Samish acknowledgment proceeding. *Id.* at 976.

b. The court of appeals affirmed both the *res judicata* and intervention rulings, holding that "[e]ven if the federal government says that the Samish are an official Indian tribe, whether they may fish as a treaty tribe in common with the Tulalip is another question." 996 F.2d at 975. The court of appeals explained the distinction as follows:

> To gain federal acknowledgment, the Samish must establish the requisite social cohesion and community, continuity of political authority and ancestry from a historic tribe. *See* 25 C.F.R. §§ 83.1 thru 83.7. To assert treaty fishing rights, the Samish must demonstrate that they descended from a treaty signatory and "have maintained an organized tribal structure." *Washington II*, 641 F.2d at 1372.
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> * * * * *
>
> [T]he Samish need not assert treaty fishing rights to gain federal recognition. They might document repeated identification by federal and state authorities, *see* 25 C.F.R. § 83.7(a), sometime after or independent of the 1855 Treaty. Even if they obtain federal tribal status, the Samish would still have to confront the decisions in *Washington I and II* before they could claim fishing rights. Federal recognition does not self-execute treaty rights claims.

Greene I, 996 F.2d at 976-977.

The court of appeals rejected the argument of the Tulalip Tribe, in seeking to intervene in the acknowledgment proceedings, that factual determinations in the administrative proceedings concerning Samish's application for federal acknowledgment could be used to over-

turn the decisions in *Washington I* and *II* concerning Samish's efforts to obtain treaty fishing rights. The court reasoned that "the district court ruled expressly that the ALJ 'will not consider' treaty rights established by [*Washington II*]." 996 F.2d at 977 (citation omitted). The court of appeals further concluded that Tulalip's asserted interest in defending *Washington II* from collateral attack was "immaterial," because the district court had "explicitly ruled that the Samish may not use the reopened hearing to attack [*Washington II*]." *Ibid.* The court likewise determined that the Tulalip's concern that a decision to acknowledge Samish could undermine the finality of *Washington II* was unwarranted, because "[t]he *Washington I* court need not accord any deference to an agency proceeding that has been expressly limited to matters other than rights under the 1855 treaty. * * * Tulalip's interests are not practically impaired precisely because each action has an independent legal effect." *Id.* at 978.

c. In a separate ruling, the district court concluded that due process required a hearing on the Samish acknowledgment petition and remanded it to the agency for a formal adjudication. The United States appealed from that decision. See *Greene* v. *Babbitt*, 64 F.3d 1266 (9th Cir. 1995) (*Greene II*). Tulalip appeared as amicus curiae in that appeal to argue that Samish was collaterally estopped by *Washington II* from litigating issues concerning federal acknowledgment.

The court of appeals ruled that, while *Washington II* had "finally determined the Samish were not entitled to tribal treaty fishing rights," *Greene I* had established that "the issues of tribal recognition and treaty tribe status [are] fundamentally different." *Greene II*, 64 F.3d at 1269. The court therefore held that the *Wash-*

ington II litigation did not preclude Samish's pursuit of federal recognition as a tribe for purposes of securing benefits for its members under federal entitlement programs. The court explained that "the recognition of the tribe for purposes of statutory benefits is a question wholly independent of treaty fishing rights." *Id.* at 1270. The court reiterated that the interests at stake in the treaty-rights litigation would not be affected by a decision to recognize Samish:

> *Greene [I]* * * * squarely rejected the Tulalip's position that federal recognition of the Samish would be inconsistent with *Washington I* and *II*. Instead, we agreed with the district court in *Greene* that the question of federal recognition as a tribe "did not implicate treaty claims." *Greene* at 975. We are bound by *Greene [I]*.

Ibid.

d. Following a hearing on remand to the agency, an Interior Department administrative law judge (ALJ) recommended that the Samish Tribe be acknowledged. See *Greene* v. *Babbitt*, 943 F. Supp. 1278, 1282 (W.D. Wash. 1996). The Assistant Secretary agreed in a final decision dated November 8, 1995. *Ibid.*; see 61 Fed. Reg. 15,825 (1996) (publication of final decision). The decision explicitly made "no determination as to what rights, if any, the [Samish Tribe] or its members may have pursuant to any treaty." *Id.* at 15,826.

5. More than five years later, the Samish Tribe filed the motion at issue here, in which it asserted that its acknowledgment as a Tribe was an "extraordinary circumstance" warranting relief from the judgment in *Washington II* under Federal Rule of Civil Procedure 60(b)(6). Samish asserted that its acknowledgment was